SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 214

THE UNITED STATES OF AMERICA,
PETITIONER,

vs.

CUMBERLAND PUBLIC SERVICE COMPANY,
a Corporation.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the Court of Claims of the United States

No. 46963

CUMBERLAND PUBLIC SERVICE COMPANY, a Corporation,
CLAIMANT,

VS.

UNITED STATES OF AMERICA,
DEFENDANT.

Petition—Filed April 5, 1946

To the Honorable the Chief Justice and Judges of the United States Court of Claims:

The above-named claimant by this, its petition, respectfully shows:

1. That at all times hereinafter mentioned, until completion of dissolution proceedings as herein stated, claimant was a domestic corporation, created under and existing by virtue of the laws of the State of Kentucky, having its principal office and place of business at Burkesville, Cumberland County, Kentucky. Claimant's formal corporate existence was terminated by voluntary dissolu-
2 tion proceedings commenced on August 13, 1940, pursuant to the provisions of Section 561, Carroll's Kentucky Statutes, then in full force and effect (now codified as Section 271.300 of the Kentucky Revised Statutes). Under the provisions of said law, claimant has continued to act as a corporation for the purpose of closing up its business, but for no other purpose. Claimant has closed its business and settled its affairs as speedily as possible, and nothing remains thereof except the disposition of the claim involved in this litigation. Delays in the disposition of the claim herein presented have been occasioned (a) by the leisurely course pursued by the Commissioner of Internal Revenue, and (b) by the absence of an important witness for claimant who has until recently been in military service outside the continental limits of the United States.

2. The claimant has a just claim for refund of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70), being for income and declared value excess profits taxes, and of Two thousand six hundred and forty-three and 48/100 Dollars ($2,643.48), interest thereon paid by it to the Collector of Internal Revenue for the District of Ken-

tucky on the dates hereinafter mentioned, as income and declared value excess profits taxes, and interest thereon, for the calendar year 1940, which said sum was wrongfully assessed and collected by the Commissioner of Internal Revenue of the United States.

3. The provisions of the law under which such wrongful assessment and collection were made are contained in Section 22 of an Act of Congress approved May 28, 1938, and known as the Revenue Act of 1938, 52 Stat. 447.

3 4. The provisions of law under which claimant claims such refund are contained in Section 322 of the Revenue Act of 1938, 52 Stat. 447; Section 322 of an Act of Congress approved February 10, 1939, and known as the Internal Revenue Code, and Section 3226 of the Revised Statutes of the United States.

5. Pursuant to the provisions of Section 3173 of the Revised Statutes of the United States, as amended, and of other acts of Congress made and provided, the claimant on or about March 7, 1941, and on official form No. 1120, made to the Commissioner of Internal Revenue its final return of income, and excess profits taxes for the said calendar year 1940 and reported thereon a net loss in income of Seven thousand six hundred and two and 49/100 Dollars ($7,602.49), and no tax liability thereon.

6. The Commissioner of Internal Revenue audited and revised the return of income and excess-profits taxes so filed by the claimant and determined and assessed on the November, 1943, supplemental list, taxes in the amount of Seventeen thousand fifty-four and 70/100 Dollars ($17,054.70).

7. The said assessment having been transferred to the Collector of Internal Revenue for the Kentucky District, the said Collector on November 24, 1943, made demand on the claimant for the said sum of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70). In anticipation of said demand the assessment was discharged by the payment of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70) tax on October 15, 1943, and Two thousand, six hundred and forty-three and 48/100 Dollars ($2,643.48) interest on December 16, 1943.

4 8. On information and belief, the claimant avers that the said sums so paid as orginal tax to the Collector of Internal Revenue for the District of Kentucky, were by the said officials turned over to and deposited in the Treasury of the United States as in the usual course of business of such officials.

9. Pursuant to the provisions of Section 3220 of the Revised Statutes of the United States, as amended, and pursuant to the provisions of other acts of Congress, and on July 26, 1944, the claimant duly filed with the said Collector of Internal Revenue of the District of Kentucky at Louisville, Kentucky, a claim for refund in the amount of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70), or such greater amount as is legally refundable, purporting to represent the said tax paid in the amount of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70), and Two thousand, six hundred and forty-three and 48/100 Dollars ($2,643.48) interest paid thereon, a copy of which said claim for refund is attached hereto and marked "Exhibit A" (on page 16 hereof). The basis of such claim is that the said tax and interest were illegally collected from the claimant by reason of errors of the Commissioner of Internal Revenue (a) in including in taxable net income as gains on a sale of assets the sum of Seventy-one thousand, two hundred and ninety-three and 12/100 Dollars ($71,293.12); (b) in disallowing a loss of Six thousand, two hundred and fourteen and 99/100 Dollars ($6,214.99), and (c) in disallowing a loss of One thousand, two hundred and ninety and 12/100 Dollars ($1,290.12), said losses resulting from sales to claimant's stockholders.

10. The Commissioner of Internal Revenue considered the said claim for refund so filed by claimant and by his letter dated August 18, 1945, advised the claimant that the said claim was rejected in full. (A copy of said rejection letter is attached hereto and marked "Exhibit B" on page 22 hereof.)

11. The said sums of Seventeen thousand, fifty-four and 70/100 Dollars ($17,054.70), representing tax, and of Two thousand, six hundred and forty-three and 48/100 Dollars ($2,643.48), interest thereon, so paid to the Collector of Internal Revenue, are wrongfully withheld from the claimant for the following listed reasons:

(a) The respondent erroneously included in income a gain of Seventy-one thousand, two hundred and ninety-three and 12/100 Dollars ($71,293.12) from an alleged sale of the electric transmission and distribution facilities of claimant.

(b) The respondent erroneously disallowed and denied to claimant a deduction for a loss of Six thousand, two hundred and fourteen and 99/100 Dollars ($6,214.99), incurred by claimant on a sale of assets to its stockolder, E. S. Mayes.

(c) The respondent erroneously disallowed and denied to claimant a deduction for a loss of One thousand, two hundred and ninety and 12/100 Dollars ($1,290.12) incurred by claimant on a sale of properties to its stockholder, W. L. McComas.

Said amounts so paid to the Collector are illegally withheld from the claimant.

12. The claimant made no sale of its transmission and distribution facilities and realized no gain from the transfer of same. During April, 1940, and prior thereto, the claimant was engaged in negotiations with the Tri-County Electric Membership Corporation of Lafayette, Tennessee, hereinafter called "Tri-County," for the sale of claimant's said facilities. On or about April 27, 1940, the claimant broke off said negotiations and rejected an offer of $86,000.00 as made by Tri-County to purchase.

13. On or about May 15, 1940, claimant's counsel renewed discussions with W. E. Herring, of the Rural Electrification Administration, in Washington, D. C., relative to the possibility of effecting a sale of said assets at a higher price. Said Rural Electrification Administration was interested in lending the necessary purchase money to Tri-County. During said discussion said Herring raised the offer of Tri-County to $104,000.00.

14. By a letter dated May 31, 1940, claimant's counsel advised the Rural Electrification Administration that the claimant would not accept said offer of $104,000.00, but that E. S. Mayes and L. S. McComas, individuals and stockholders of claimant, were willing to undertake to acquire and sell said properties for the sum of $104,000.00. (A copy of said letter is attached hereto as claimant's "Exhibit C," on page 23 hereof.)

15. Under date of June 10, 1940, said E. S. Mayes and W. L. McComas, as individuals, entered into a written agreement with Tri-County whereby, as vendors, they agreed to sell to Tri-County the electric transmission and distribution liens and facilities to be acquired from this claimant, and Tri-County agreed to pay vendors the sum of $104,000.00, said agreement being subject to approval by the Administrator of Rural Electrification Administration. (A copy of said agreement is attached hereto as claimant's "Exhibit D," on page 26 hereof.)

16. Under date of August 9, 1940, Zana M. Mayes, wife of E. S. Mayes, and Katharine T. Mayes, wife of Finley M. Mayes, entered into a contract with E. S. Mayes

by which they each transferred to E. S. Mayes fifty shares of stock on the books of claimant and appointed him their agent to assist in the liquidation of this corporation claimant. (A copy of said contract is attached hereto as claimant's "Exhibit E," on page 34 hereof.)

17. Under ~~date of~~ August —, 1940, D. Keith McComas, W. Leslie McComas, Jr., Jack D. McComas and Elizabeth O. McComas, children of W. L. McComas, entered into a contract with W. L. McComas by which they each transferred to W. L. McComas forty shares of stock on the books of claimant and appointed him their agent to assist in the liquidation of this corporation claimant. Though undated, said contract was executed and delivered prior to August 13, 1940, the date of the meeting of claimant's stockholders hereinafter mentioned. (A copy of said contract is attached hereto as claimant's "Exhibit F," on page 36 hereof.)

18. On August 13, 1940, ~~at~~ a special meeting of all the stockholders of claimant, a resolution was unanimously adopted that claimant be dissolved and that a distribution to its stockholders be made in cash or in kind of all its assets not required to pay all of its outstanding indebtedness. (A copy of the minutes of said meeting is attached hereto as claimant's "Exhibit G," on page 38 hereof.)

19. On the same day, August 13, 1940, at a meeting of the Board of Directors of claimant, said resolution of dissolution by said stockholders was considered and a resolution as quoted below was offered, and unanimously adopted:

"RESOLVED FIRST, that W. L. McComas and E. S. Mayes be and they are hereby constituted a committee for liquidation and said committee be and is hereby authorized and directed to take such action as shall be necessary or desirable for the purpose of realizing upon the assets of the corporation the payment of its debts and the distribution to the stockholders of the assets of the corporation which shall remain after provision for the payment of said debts shall have been made.

"RESOLVED FURTHER, that said liquidation committee be and they are hereby authorized and directed to set aside from the assets of the corporation a fund sufficient to pay all debts of said corporation.

"RESOLVED FURTHER, that W. L. McComas as President, and F. M. Mayes, as Secretary, be and they are hereby authorized and directed to forthwith convey to the stockholders of this corporation of record at the

date of such conveyance all of the electric transmission and distribution facilities of this corporation located in the counties of Cumberland, Metcalfe, and Monroe in the Commonwealth of Kentucky, together with all services and connecting lines, fixtures and equipment used in connection therewith, and together with all easements, rights of way, or other interests in lands used in connection with such transmission and distribution liens, and all other rights, licenses, franchises, privileges, or permits used in connection with said lines, and that said officers be and they are hereby authorized and directed to execute, acknowledge and deliver for and on behalf of this corporation such instruments or documents as may be necessary or desirable to effect such conveyance and to affix the seal of this corporation to any or all of such instruments or documents."

(A copy of the minutes of said meeting is attached hereto as claimant's "Exhibit H." on page 39 hereof.)

9 20. On or about September 5, 1940, a joint application before the Public Service Commission of Kentucky was filed by this claimant, W. L. McComas and E. S. Mayes, and Tri-County Electric Membership Corporation, setting forth that this claimant was taking steps to dissolve and to determine its corporate existence; that as part of its plan of liquidation its electric transmission and distribution system would be conveyed to W. L. McComas and E. S. Mayes as a liquidating dividend; that W. L. McComas and E. S. Mayes desired to sell and Tri-County desired to purchase said properties; that claimant desired to cease operation of said properties upon conveyance; that W. L. McComas and E. S. Mayes desired to continue operation of said properties until delivery of deed and bill of sale to Tri-County, and then to cease operations; That Tri-County desired to begin operation of said properties immediately upon delivery to it of the deed from W. L. McComas and E. S. Mayes, and that until delivery of such deed W. L. McComas and E. S. Mayes be permitted to continue such operation under the trade name of Cumberland Public Service Company. (A copy of said application is attached hereto as claimant's "Exhibit I," on page 41 hereof.)

Permission to consummate and carry into effect the proposed dissolution, operation, sale and purchase was granted on September 27, 1940, by the Public Service Commission of Kentucky. (A copy of said order is attached hereto as claimant's "Exhibit J," on page 45 hereof.)

21. Prior to the 6th day of September, 1940, and pursuant to the resolution adopted by its stockholders on August 13, 1940, claimant caused a notice to be published once a week, for four consecutive weeks, in a newspaper printed and published in the county wherein its principal place of business was located, stating that claimant was dissolving and closing up its business. A memorandum of the dissolution duly signed by an officer of claimant was duly attested, was transmitted to the County Clerk of Cumberland County, Kentucky, said office being the place where claimant's Articles of Incorporation were recorded.

Likewise claimant sent to the Secretary of State of Kentucky a written notice, signed by an authorized officer, with a copy of the action of claimant authorizing dissolution and a copy of the newspaper notice as published, and the same were filed by the Secretary of State of Kentucky and the dissolution of claimant was noted on the records of his office. (A copy of the instrument so filed and a copy of the newspaper notice are attached hereto as claimant's "Exhibit K," on page 47 hereof.)

22. Under date of October 22, 1940, this claimant, by its deed executed by W. L. McComas, President, and attested by F. M. Mayes, Secretary, and pursuant to said resolution adopted by the Board of Directors on August 13, 1940, transferred to W. L. McComas and E. S. Mayes, sole stockholders, claimant's electric transmission and distribution facilities, as a liquidating dividend. (A copy of said deed is attached hereto as claimant's "Exhibit L," on page 48 hereof.)

23. Under date of October 24, 1940, W. L. McComas and Agnes O. McComas, his wife, and E. S. Mayes and Zana McElroy Mayes, his wife, transferred and conveyed said properties so received from claimant to Tri-County Electric Membership Corporation. (A copy of said deed is attached hereto as claimant's "Exhibit M," on page 54 hereof.)

24. The respondent erroneously treated said above described transaction (paragraphs 11(a) to 23, inclusive) as a sale by or on behalf of claimant, and computed and included in income a net gain of Seventy-one thousand, two hundred, ninety-three and 12/100 dollars ($71,293.12).

25. In addition to the properties conveyed to W. L. McComas and E. S. Mayes as a liquidating dividend in the manner described in the foregoing paragraphs, claim-

ant owned certain other properties of small value which it was obliged to dispose of in the course of winding up its affairs. These consisted of one 1937 Ford truck, certain machinery and equipment, and two small lots or parcels of land lying respectively in the towns of Tompkinsville and Burkesville, Kentucky. Claimant made efforts in good faith to sell said properties to persons other than its stockholders but was unsuccessful in obtaining offers for any of the same at prices approaching what claimant considered to be the fair market values of the same at that time.

26. On or about November 12, 1940, E. S. Mayes, one of the two stockholders of claimant tendered to the liquidating committee his written offer to purchase the 1937 Ford truck and the other machinery and equipment for the sum of One thousand, nine hundred and fifty dollars ($1,950) in cash, conditioned upon the privilege of allowing such machinery and equipment to remain in the buildings wherein the same were situated upon the above mentioned lots of land in Burkesville and Tompkinsville, Kentucky, for a period of two years, free of any charge for rent or storage. Said offer of E. S. Mayes was in excess of any other offers obtained by Claimant and represented the fair market value of said property at that time. (A copy of the said written offer is attached hereto as claimant's "Exhibit N," on page 61 hereof.)

12 At a meeting of claimant's liquidating committee held on November 16, 1940, said liquidating committee accepted the above mentioned offer of E. S. Mayes and sold to said E. S. Mayes the said Ford truck and other machinery and equipment for the sum of One thousand, nine hundred and fifty dollars ($1,950) in cash. Under date of November 30, 1940, a bill of sale for said property was executed and delivered to E. S. Mayes, who paid the agreed cash consideration therefor. (A copy of the minutes of the said meeting of claimant's liquidating committee is attached hereto as claimant's "Exhibit O," on page 62 hereof; and a copy of said bill of sale is attached hereto as claimant's "Exhibit P," on page 67 hereof.)

The property sold by claimant to E. S. Mayes as above set forth then had a depreciated value on claimant's books of $8,164.99 and by virtue of the above described sale, claimant sustained a loss of $6,214.99. The respondent erroneously treated said transaction as a distribution in liquidation and rejected the claim of a loss on the part of claimant in connection therewith.

27. On or about November 12, 1940, W. L. McComas, one of the two stockholders of claimant, tendered to the liquidating committee his written offer to purchase the two lots or parcels of land, with improvements thereon, situated respectively in Tompkinsville and Burkesville, Kentucky, for the sum of One thousand, five hundred and fifty dollars ($1,550) in cash agreeing at the same time to permit the purchaser of the machinery and equipment to leave the same upon the premises for two years without charge for storage or rental. Said offer of W. L. McComas was in excess of any other offers obtained by claimant and represented the fair market value of said property at that
13 time. Claimant could not obtain any other offer at all coupled with the above mentioned provision for the free storage of the machinery and equipment, and but for such provision claimant could have obtained no offer whatever for the machinery and equipment itself except at purely junk values. (A copy of the written offer of W. L. McComas is attached hereto as claimant's "Exhibit Q," on page 70 hereof.)

At the above mentioned meeting of claimant's liquidating committee held on November 16, 1940 (as shown by claimant's "Exhibit O"), said liquidating committee accepted the above mentioned offer of W. L. McComas and sold to him the said lots or parcels of land, with improvements thereon, subject to the terms and conditions of the offer, for the sum of One thousand, five hundred and fifty dollars ($1,550) in cash. Under date of November 30, 1940, a deed for said property was executed and delivered to W. L. McComas who paid the agreed cash consideration therefor. (A copy of said deed is attached thereto as claimant's Exhibit R," on page 71 hereof.)

The property sold by claimant to W. L. McComas as above set forth then had a depreciated value on claimant's books of Two thousand, eight hundred, forty and 12/100 dollars ($2,840.12) and by virtue of the above described sale claimant sustained a loss of One thousand, two hundred ninety and 12/100 dollars ($1,290.12). The respondent erroneously treated said transaction as a distribution in liquidation and denied claimant's loss with respect thereto.

28. Claimant states that no action upon this claim other than herein stated has been had before Congress or any other of the departments of the Government; that claimant has at all times through its officers and agents borne true allegiance to the United States of America,

and has not in any way voluntarily aided or abetted, or given encouragement to rebellion against said Government; and that it is the sole owner of the claim hereinabove presented, never having sold or assigned the same, or any part thereof, or any interest therein, to any person; and that it is justly entitled to recover the amount claimed after allowing all just credits and offsets.

The claimant believes the facts as hereinbefore stated to be true.

Wherefore the claimant Cumberland Public Service Company, a corporation, prays judgment against the United States of America, upon the facts and law, for the sum of Seventeen thousand, fifty-four and 70/100 dollars ($17,054.70) together with interest thereon from October 15, 1943, until paid; and for the sum of Twenty-six hundred, forty-three and 48/100 dollars ($2,643.48) with interest thereon from December 16, 1943, until paid; for its costs and disbursements herein expended; and for all other proper and equitable relief to which it may now or hereafter appear entitled.

CUMBERLAND PUBLIC SERVICE COMPANY,
Claimant,
By CORNELIUS W. GRAFTON,
Attorney.

Duly sworn to by Cornelius W. Grafton.
Jurat omitted in printing. (All in italics.)

Exhibit "A" to Petition

Form 843
TREASURY DEPARTMENT
Internal Revenue Service
(Revised April 1940)

CLAIM

To be filed with the Collector where assessment was made or tax paid

Collector's Stamp
(Date received)

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

☐ Refund of Tax Illegally Collected.
☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Kentucky, }
County of Jefferson. } ss.

Type or Print
Name of taxpayer or purchaser of stamps: Cumberland Public Service Co.
Business address: Washington Bldg., Louisville, Ky.
Residence: Formerly Burkesville, Ky.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) filed: Kentucky.
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1940 to Dec. 31, 1940.
3. Character of assessment or tax: Income tax and declared value excess-profits tax.
4. Amount of assessment, $17,054.70; dates of payment Oct. 15, 1943, Interest $2,643.48.
5. Date stamps were purchased from the Government:
6. Amount to be refunded (plus interest of $2,643.48): $19,698.18.
7. Amount to be abated (not applicable to income or estate taxes): $
8. The time within which this claim may be legally filed expires, under Section 322 (b) (1) of the Revenue Code on Oct. 15, 1945.

The deponent verily believes that this claim should be allowed for the following reasons:

Per statement hereto attached.

CUMBERLAND PUBLIC SERVICE CO.
Signed W. L. McCOMAS

E. S. MAYES
Liquidating Committee.

W. L. McComas sworn by Mildred Derr 6/23/44.
E. S. Mayes sworn by Julia Wharton 6/27/44

17 STATEMENT (FORM 843).

The entire tax of $17,054.70, refund of which is claimed herein, was based upon three errors of the Commissioner in adjusting the taxable income as reported by Cumberland Public Service Company in its income tax return for the year 1940, namely:

1. Adding to income a gain of $71,293.12 from an alleged sale of assets;

2. Disallowance of a loss of $6,214.99 incurred by the said corporation in a sale of certain of its assets to its stockholder, E. S. Mayes; and

3. Disallowance of a loss of $1,290.12 incurred by the corporation in a sale of certain other assets to its stockholder, W. L. McComas.

Statement of Facts.

The Cumberland Public Service Company (hereafter called Cumberland) was organized under the laws of Kentucky. It was engaged in the business of production and sale of electricity in certain Kentucky communities and districts. During April 1940, it was approached by representatives of the Tri-County Electric Membership Corporation (hereafter called Tri-County) of Lafayette, Tenn., with a view to purchase by Tri-County of the transmission and distribution systems of Cumberland. After some negotiations, during which Tri-County had refused to purchase the stock of Cumberland because counsel for Tri-County announced that the Rural Electrification Administration from which Tri-County had to borrow the purchase money would not permit purchase of stock, the officers and stockholders of Cumberland refused an offer of $86,000.00 for its properties, not only because the offer was not sufficient in amount, but because the Federal tax on a sale by Cumberland would be prohibitive.

Subsequently, about May 15, 1940, counsel for Cumberland was in New York City and engaged in further
18 conversations with counsel for Tri-County and advised that Cumberland would not be interested in making a sale, but that Messrs. W. L. McComas and E. S. Mayes, two stockholders, were planning to dissolve Cumberland, and, after dissolution they would be willing to sell the properties desired for $104,000.00.

Under date of June 10, 1940, W. L. McComas and E. S. Mayes on the one part, and Tri-County on the other part, entered into an agreement wherein McComas and Mayes expected to acquire, and would upon acquisition, sell to Tri-County, the transmission and distribution systems of Cumberland for a consideration of $104,000.00. The date of closing the sale was Sept. 1, 1940, or such other date as might be agreed upon.

On August 13, 1940, the stockholders of Cumberland adopted a resolution to dissolve the corporation and distribute its assets to the stockholders, and authorized the Board of Directors to take such action as might be necessary to effect dissolution. It was further resolved that W. L. McComas and E. S. Mayes be appointed a committee for liquidation to pay the debts of the corporation and distribute to stockholders assets remaining after payment of debts.

At a meeting of the Board of Directors on the same day, it was

> "Resolved Further, that W. L. McComas, as president, and F. M. Mayes, as Secretary, be and they are hereby authorized and directed to forthwith convey to the stockholders of this corporation of record at the date of such conveyance all of the electric transmission and distribution facilities of this corporation * * *, and that said officers be and they are hereby authorized and directed to execute, acknowledge and deliver for and on behalf of this corporation, such instruments or documents as may be necessary or desirable to effect such conveyance and to affix the seal of this corporation to any or all of such instruments or documents."

19 Pursuant to and under the authority of said resolutions, on August 13, 1940, of the stockholders and Board of Directors, the corporation, Cumberland Public Service Company, under date of Oct. 22, 1940, by its President, W. L. McComas, and attested by F. M. Mayes, Secretary, with the corporate seal affixed, "in consideration of the promises and in part satisfaction of the obligation of the Grantor to distribute its assets to the Grantees," transferred and conveyed to W. L. McComas and E. S. Mayes its electric transmission and distribution systems, etc.

Under date of Oct. 24, 1940, W. L. McComas and his wife and E. S. Mayes and his wife sold and conveyed said same properties thus acquired to Tri-County. In income tax returns the sale price and gain thereon were reported in pro rata portions by the several individuals, according to their respective beneficial ownership interests in the properties thus received in liquidation. The Commissioner treated the transaction as a sale by or on behalf of Cumberland and computed gain as first above stated. This action was erroneous and wrongful and contrary to the facts and the law.

2. Disallowance of a loss of $6,214.99 on a sale of assets by Cumberland to E. S. Mayes.

3. Disallowance of a loss of $1,290.12 on a sale of assets by Cumberland to W. L. McComas.

These two may be discussed in common.

After the distribution in liquidation of the transmission and distribution systems and the payment of debts, some divers and sundry assets remained for which there was no market. On Nov. 16, 1940, the Liquidating Committee (composed of W. L. McComas and E. S. Mayes) met to consider written offers for portions of said assets.

W. L. McComas made an offer of $1,550.00 for a lot or parcel of ground in Burkesville and one in Thompkinsville. E. S. Mayes submitted an offer of $1,950.00 for some old and obsolete machinery. Both offers were accepted by the Committee. The loss to the corporation on the lots was $1,290.12, and that on the machinery was $6,214.99.

20 A deed to the lots and a bill of sale for the machinery were executed and delivered by the Liquidation Committee.

The Commissioner denied deductions of both losses. The deficiency notice stated—"It is held that you are not entitled to deduct"—the losses. The revenue agent's report, in discussing the said sale—"However, in substance, it was the same as a liquidation distribution in kind, and it has been so treated in this report." Both transactions were bona-fide sales for valid considerations and the losses resulting were and are deductible.

Final dissolution on Nov. 30, 1940.

The total tax, $17,054.70, arising from the three above-recited adjustments, was paid on Oct. 15, 1943, and interest in the sum of $2,643.48 was paid on Dec. 16, 1943. These sums were paid by checks of the Cumberland Public Service Company, it having been reimbursed by contributions from the respective stockholders in proportion to their beneficial ownership interests. An original assessment was made against the corporation and transferee assessments were made against each of the stockholders.

Those contributing and their respective amounts of income tax and interest, and the excess-profits tax and interest, and totals are listed below:

Taxpayer	Income Tax	Interest	Declared Value Excess Profits Tax	Interest	Total
E. S. Mayes	$ 2,124.60	$ 329.31	$ 7.25	$ 1.12	$ 2,462.28
Zana M. Mayes	2,124.59	329.31	7.24	1.13	2,462.27
F. M. Mayes	2,124.60	329.31	7.24	1.12	2,462.27
Katherine T. Mayes	2,124.59	329.31	7.24	1.13	2,462.27
W. L. McComas	1,699.68	263.45	5.79	.90	1,969.82
D. Keith McComas	1,699.67	263.45	5.80	.90	1,969.82
W. Leslie McComas	1,699.68	263.45	5.79	.90	1,969.82
Jack D. McComas	1,699.67	263.45	5.79	.90	1,969.81
Elizabeth O. McComas	1,699.68	263.45	5.80	.89	1,969.82
Cumberland Public Service Company	$16,996.76	$ 2,634.49	$ 57.94	$ 8.99	$19,698.18

21 Separate claims for refunds of income taxes and of excess-profits taxes are concurrently filed for each and every contributor as transferee, and for the corporation. These claims should be considered together.

The claims, as between the transferor and the transferees, are in the alternative, and should a total refund of $19,698.18 and interest be granted, adjudicated or paid on any claim or claims, all other claims are to be considered cancelled and held for nought.

22 *Exhibit "B" to Petition.*

TREASURY DEPARTMENT
Washington 25

Office of
Commissioner of Internal Revenue

Address Reply to
Commissioner of Internal Revenue
and Refer to
IT:CI:CC:Rej

Aug. 18, 1945

Cumberland Public Service Company
Washington Building
Louisville, Kentucky

In re: Claim for refund of $19,698.18
For the year 1940

Gentlemen:

Reference is made to revenue agent's report dated March 7, 1945 with respect to your tax liability. A copy of the

report was forwarded to you, and you were informed that the claim or claims for refund indicated above would be disallowed.

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

(Signed) NORMAN D. CANN,
Deputy Commissioner.

23 *Exhibit "C" to Petition*

May 31, 1940.

Mr. W. E. Herring,
Rural Electrification Administration,
Washington, D. C.

Re: Tennessee 9 Macon.

Dear Mr. Herring:

Since my conversation with you on May 15, 1940, I have consulted with Messrs. McComas and Mayes and have in their behalf now completed a survey of the problems which would be involved in a sale to you. After considering the net result to the corporation, the directors of Cumberland Public Service Company have determined that the corporation will not accept an offer of $104,000.00 for the transmission and distribution lines.

Mr. McComas and Mr. Mayes individually, however, are willing to enter into a contract with the cooperative in such form as will be acceptable to your administration under the following terms and conditions.

(1) Messrs. McComas and Mayes as individuals will acquire the transmission and distribution lines of Cumberland Public Service Company and will agree to deed the same to the cooperative for a consideration of $104,000.00, such delivery and such payment to be made as soon as practicable after September 1, 1940, and in any event within thirty days thereafter.

(2) The cooperative will immediately and in any event, on or before June 10, 1940, without expense to my clients, procure whatever permission is necessary and make whatever connections are necessary to furnish to Cumberland Public Service Company or to Messrs. McComas and Mayes, if they are then the owners of the transmission and dis-

tribution lines, such power at standard TVA rates as they may need to supply that system.

(3) From and after the acceptance of this proposal, if accepted, Messrs. McComas and Mayes will cause the same service to be made available to the customers of Cumberland Public Service Company and at the same rates until the date of the delivery of the deed as set out in paragraph (1) so that you will be assured of a going concern being conveyed to you. During this period the cooperative is to have the right to either (a) make any additions or extensions or improvements on the transmission and distribution lines at the expense of such cooperative or (b) upon the specific order and direction of the cooperative, Messrs. McComas and Mayes will cause such extensions, improvements and additions to be made and the actual cost thereof will be added to the purchase price.

(4) On or before the date of the delivery of the deed, Messrs. McComas and Mayes will pay or cause to be paid all state, county, city, school district or other ad valorem taxes on said transmission and distribution lines then payable, but subject to such ad valorem taxes as may be by law then a lien against the property but not yet due and payable.

The reason for postponing delivery of the deed to September 1st or thereafter is because that I have now ascertained that the mortgage securing the outstanding bonds of the company provides that the bonds are callable on interest payment dates only and the next interest payment date is September 1st. As I told you in Washington a substantial part of the bonds are held by friends of Messrs. McComas and Mayes but some of the bonds are otherwise held and we find that we can not count on being able to get them in and so release the mortgage prior to September 1st.

As I explained to you in Washington, the power situation is an acute problem and while it is entirely agreeable to my clients to enter into an agreement looking to a delivery of the property in the future they can only do so in the event they are assured there will be no breakdown in the meantime. You advised me that you thought you could get from TVA permission for temporarily supplying such current where there was an actual contract under which the cooperative was to require the property and I assume that you have not found TVA's attitude to the contrary.

The foregoing conditions have been discussed informally by Mr. McComas with Mr. Sullivan in an attempt to find

some way in which to make the deal. It will probably take not less than two or three months in any event to complete the corporate transactions necessary to the delivery of the property in such form as is desired by your legal staff and Mr. Sullivan expressed the view that it was to the advantage of the cooperative to have some two or three months in which to get the improvements made before actually taking over the property as he anticipated a rush of new customers at that time.

I am sending copies of this letter to Mr. McComas who will doubtless furnish one to Mr. Sullivan or to Mr. Parker. As soon as you have consulted with these gentlemen and can advise me whether our suggestions are practical, I will be delighted to have my clients meet you at such time and place as is convenient for a more formal agreement to work it out.

Yours very truly,

(Signed) ARTHUR W. GRAFTON.

AWG/as
CC—Mr. McComas.

26 *Exhibit "D" to Petition*

AGREEMENT, made as of June 10, 1940, between W. L. McComas of Louisville, Kentucky, and E. S. Mayes of Springfield, Kentucky (said McComas and said Mayes being hereinafter collectively called the "Vendors"), and Tri-County Electric Membership Corporation (hereinafter called "Tri-County"), a cooperative corporation organized and existing under the laws of the State of Tennessee.

WITNESSETH:

WHEREAS, Cumberland Public Service Company (hereinafter called "Cumberland") has acquired and is now operating an electric system in the State of Kentucky, including, without limitation, certain electric transmission and distribution lines and facilities in Cumberland, Metcalfe, and Monroe Counties in the Commonwealth of Kentucky; and

WHEREAS, Vendors expect to acquire all of such electric transmission and distribution liens and facilities of Cumberland and, in the event of such acquisition, desire to sell to Tri-County the electric transmission and distribution lines and facilities so acquired immediately upon such acquisition, and Tri-County is willing to purchase such electric transmission and distribution lines and facilities upon the terms and conditions herein set forth;

NOW, THEREFORE, for and in consideration of the mutual agreements herein contained, the parties hereto covenant, promise and agree as follows:

Section 1. Vendors shall grant, bargain, sell, alien, enfeoff, remise, release, convey, confirm, transfer and deliver to Tri-County the property more particularly described in the Deed and Bill of Sale, marked "Exhibit A," attached hereto and by this reference made a part hereof, with such additions and betterments as may be made to the existing system of Cumberland between the date
27 of this contract and the Closing Date hereinafter provided for, all with convenants of warranty as set forth in such Exhibit A, free and clear of all liens and encumbrances of every kind and nature whatsoever, except ad valorem taxes which are to be prorated and provided for as set forth in section 5 hereof. Such properties shall be conveyed as a going electric system with the exclusive right as between the parties hereto and parties in privity with them to serve the consumers being served through such properties at the time of such conveyance. The Deed and Bill of Sale shall be executed and delivered in a sufficient number of counterparts to permit Tri-County to record such instruments simultaneously in the three counties in which the property to be acquired is located.

Section 2. In consideration of such sales, conveyance and delivery, Tri-County shall pay to Vendors on the Closing Date the sum of One Hundred Four Thousand Dollars ($104,000).

Section 3. Vendors will pay to Tri-County on the Closing Date an amount equal to the amounts of customer meter deposits and customer refundable contributions for extensions including accrued interest, if any, on such deposits and contributions held on the Closing Date in respect of the properties conveyed, and Tri-County shall assume the obligations of Cumberland and/or Vendors for the repayment of such deposits and contributions to the extent and only to the extent of such payment by Vendors.

Section 4. The closing shall take place at the offices of Bank of Cumberland, in Burkesville, Kentucky, or at such other places as Tri-County and Vendors may agree upon in writing, and the date of such closing (herein in this agreement called the "Closing Date") shall be September 1, 1940 or such other date (in any event not later than October 1, 1940) as may be similarly agreed upon in writing. Time is of the essence of this agreement. The payments

required by sections 2, 3, 5 and 7 hereof to be made
28 on the Closing Date shall be made simultaneously.

Section 5. The parties hereto agree to prorate as of the Closing Date all state, County, municipal and other ad valorem taxes on tangible property to be conveyed as herein provided, based upon the annual report required to be filed by law with the Auditor of Public Accounts of Kentucky between December 31, 1939 and March 31, 1940. Vendors shall bear 1/366 of such taxes for each day of the year 1940 up to and including the Closing Date. To the extent, if any, to which the tax rates and assessments are determined or determinable by the Closing Date, Vendors shall pay to Tri-County Vendors' pro rata share of the taxes so determined or determinable. In respect of taxes not so determined or determinable, Vendors agree to deposit on the Closing Date under an escrow agreement satisfactory to Tri-County, cash or collateral satisfactory to Tri-County in an amount sufficient to pay to Tri-County Vendors' pro rata share of such taxes as soon as determined exactly.

Section 6. Vendors agree that between the date hereof and the Closing Date no contract which must be assumed by Tri-County on the Closing Date in connection with the operation of the electric properties to be conveyed hereunder shall be entered into by Vendors or by any other person, firm or corporation other than such contracts as are incidental to the normal operation of the business to be conveyed hereunder. There shall be no general assumption by Tri-County of liabilities, *ex contractu* or *ex delicto*, but Tri-County agrees to assume as of the Closing Date, or save the Vendors unharmed from, all obligations arising subsequent under all contracts for the sale of power to the ultimate consumer (except any contracts involving the rental of generating plants, or other matters not a part of normal power sale contracts), provided that the rates specified in such contracts are the regularly published rates now charged by Cumberland and on file with the appropriate regulatory commission.

29 Section 7. From and after the effective date hereof to the Closing Date none of the property to be conveyed shall be retired from Service and no sale or other disposition of any of the property to be conveyed hereunder shall be made, permitted or suffered except of such property as may be or become worn out, unserviceable or obsolete and retired from service in the usual course of business on that account. Upon retirement from ser-

vice of such worn out, unserviceable or obsolete property, Vendors shall forthwith make, or cause to be made, adequate replacement thereof. Vendors shall operate and maintain the properties to be conveyed hereunder in accordance with good utility practice, or cause such properties to be so operated and maintained, and any additions, replacements, improvements or extensions provided for herein shall be so made. In the event that any replacements are made in respect of the transformers now located in Cumberland's substation at Tompkinsville, Kentucky, such replacements shall consist of three 75 KVA stepdown transformers, the voltage specifications of which shall be subject to the approval of Tri-County. All operations of the electric system to be conveyed hereunder shall be at Vendors' risk until the Closing Date, and in the event of any loss or damage to any of said property prior to the Closing Date from any cause whatsoever other than the wrongful act of Tri-County, Vendors shall make, or cause to be made, adequate replacement of such property or the sale price shall be reduced in the amount of such loss or damage. Tri-County shall pay to the Vendors on the Closing Date the actual cost of capital additions to the properties to be conveyed hereunder made between the date hereof and the Closing Date. The parties hereto agree that such obligation of Tri-County in so far as it applies to such capital additions made between June 10, 1940 and July 15, 1940 to the properties proposed to be conveyed shall, in any event, not exceed four hundred dollars ($400). Vendors shall pay to Tri-County on the Closing Date an amount equal to the book cost of all property to be conveyed hereunder which is retired from service between the date hereof and the Closing Date whether or not such property has been removed upon retirement, provided, however, that the three 25 KVA transformers now located at Cumberland's substation at Tompkinsville, Kentucky, shall be included in the conveyance by Vendors to Tri-County and the provision of this section 7 with respect to retirements of property and payments by Vendors to Tri-County on the Closing Date shall not apply in respect of the retirement of such transformers. Vendors agree that from the date hereof no capital additions will be made to the properties which Tri-County is obligated to purchase hereunder without the written approval of Tri-County, which consent, in respect of capital additions to be made in the usual course of business, shall not be unreasonably withheld.

Section 8. Tri-County shall, upon the execution of this agreement, forthwith construct such extensions to its present electric system as to enable power to be supplied at wholesale by Tennessee Valley Authority to Cumberland or to Vendors, as the case may be, at the 11/2.3 KV substation located at Tompkinsville, Kentucky, pursuant to a certain agreement, dated July , 1940, between Tennessee Valley Authority and Cumberland. Such power shall be supplied by Tennessee Valley Authority at 13 KV and shall be limited in amount to a maximum demand of 300 KW. In the event that the properties which the Vendors herein agree to convey on the Closing Date be not conveyed on said date, then the Vendors jointly and severally agree to purchase at the election of Tri-County within thirty (30) days thereafter such of the extensions so constructed as Tri-County may designate and pay Tri-County therefor the total cost to Tri-County of the construction and equipment of the facilities so purchased.

Section 9. Electric service rendered by Cumberland and/or Vendors and remaining unbilled upon the Closing Date shall be billed by Tri-County to the respective consumers thereof at Cumberland's rates and the amount thereof collected by Tri-County shall be prorated as of the Closing Date; for example, where meters are read ten (10) days after the Closing Date and the billing and service period is thirty (30) days, the billing shall be prorated ten-thirtieths (10/30ths) to Tri-County and twenty-thirtieths (20/30ths) to Vendors. Tri-County shall pay to Vendors, as soon as practicable after the Closing Date, that portion of the revenues derived from said consumers to which Vendors shall be entitled pursuant to this provision. Tri-County shall assist Vendors in the collection of bills for services to consumers billed prior to the Closing Date and remaining unpaid on such Closing Date.

31

Section 10. Vendors shall execute and deliver to Tri-County all such conveyances, bills of sale, assignments, opinions and other instruments in form and substance satisfactory to Tri-County as shall be reasonably requested by Tri-County and, at the request of Tri-County, shall take all such further action as may be necessary to effectuate the intention of this agreement. On the Closing Date Vendors shall deliver to Tri-County an opinion or opinions of counsel in form and substance satisfactory to Tri-County.

Section 11. All notices hereunder to Vendors shall be sufficient if sent by registered mail or telegram addressed

to W. L. McComas, at Louisville, Kentucky, or E. S. Mayes, at Springfield, Kentucky. All notices hereunder to Tri-County shall be sufficient if sent by registered mail or telegram to Tri-County Electric Membership Corporation at Lafayette, Tennessee, provided, however, that true and correct copies thereof are simultaneously sent by the same method to Rural Electrification Administration, Washington, D. C. Either of the parties hereto by notice in writing to the other party hereto may specify another and different address for purposes of notifications, and in such cases notices shall be sufficient if sent by registered mail or telegram addressed as specified in such subsequent notification. All notices shall be deemed to have been
32 given on the date of posting if sent by mail, or of delivery to the sending office of the telegraph office if sent by telegram.

Section 12. The Vendors shall obtain, or cause to be obtained, authorizations, permits and approvals to the extent required by law, from all state, federal and local authorities having jurisdiction in the premises in connection with any of the acts or transactions provided for in this agreement, including, though not by way of limitation, the Kentucky Public Service Commission. Tri-County shall render to Vendors such assistance in connection with the obtaining of such consents, approvals and authorizations as Vendors may reasonably request.

Section 13. This agreement and any ancillary agreements entered into pursuant hereto shall bind and inure to the benefit of the successors and assigns of the respective parties hereto.

Section 14. Tri-County may, upon notice to Vendors, assign all or any part of its rights under this agreement to another person, firm or corporation and agree to make such assignment if and to the extent requested by the Administrator of the Rural Electrification Administration. In the event of the receipt of notice of such assignment or assignments Vendors agree to make the conveyances, payments and assignments provided for in this agreement as directed in such notice of assignment. Any such assignee of all or any part of the rights of Tri-County pursuant to this agreement shall, by virtue of the acceptance of such assignment, agree to assume all of the duties and liabilities of Tri-County under this agreement in so far as such duties and liabilities relate to the properties or rights included within the scope of such assignment.

Section 15. This agreement may be simultaneously executed and delivered in two or more counterparts, each of which so executed and delivered shall be deemed to be an original, and all shall constitute but one and the same instrument.

33 Section 16. The effectiveness of this agreement shall be conditioned upon approval thereof by the Administrator of Rural Electrification Administration.

IN WITNESS WHEREOF Tri-County has caused this agreement to be signed in its corporate name and its corporate seal to be hereunto affixed and attested by its proper officers thereunto duly authorized, and Vendors have hereunto affixed their hands and seals, all as of the day and year first above written.

TRI-COUNTY ELECTRIC MEMBERSHIP CORPORATION

(Seal) by *President*

Attest:

Secretary

(Signed) W. L. McCOMAS (Seal)
W. L. McComas

(Signed) E. S. MAYES (Seal)
E. S. Mayes

34 *Exhibit "E" to Petition*

CONTRACT AND AGREEMENT

THIS CONTRACT AND AGREEMENT made this 9th day of August, 1940 by and between Zana M. Mayes, wife of E. S. Mayes, and Katharine T. Mayes, wife of Finley M. Mayes (parties of the first part) and E. S. Mayes (party of the second part),

WITNESSETH:

THAT WHEREAS, each of the parties to this agreement is the owner of fifty (50) shares of the capital stock of Cumberland Public Service Company, a Kentucky corporation of Burkesville, Kentucky, and all of the parties desire that said corporation be dissolved and its assets distributed to stockholders after the payment of the debts of the corporation, and in order to facilitate such action first parties have transferred their shares of stock on the books of the company to second party pursuant to this agreement, the first parties desire that second party shall act for them and as their agent to assist in the liquidation of the corporation and obtain and distribute to first parties their respective shares of the assets of said corporation or the value thereof,

NOW THEREFORE, in consideration of the premises and for the sum of One Dollar ($1.00) cash in hand paid by each of the first parties to second party, receipt of which is hereby acknowledged, the undersigned party of the second part hereby agrees that he will act as agent for each of first parties and will receive from time to time for and on behalf of each of first parties as trustee and agent for first parties all assets of Cumberland Public Service Company properly distributable to first parties, whether in money or in kind, and upon the completion of the liquidation of the assets of said corporation, party of the second part will make a true accounting to each of first parties with respect to the money and/or assets so received.

35 WITNESS the signatures of the parties this....day of August, 1940.

(Signed) ZANA M. MAYES.
(Signed) KATHERINE T. MAYES,
Parties of the First Part.

Witnesses:
Louise McElroy
W. L. McComas

E. S. MAYES,
Party of the Second Part.

36 *Exhibit "F" to Petition*

CONTRACT AND AGREEMENT

THIS CONTRACT AND AGREEMENT made this—day of August, 1940 between D. Keith McComas, W. Leslie McComas, Jr., Jack D. McComas, and Elizabeth O. McComas (parties of the first part), and W. L. McComas, Sr. (party of the second part),

WITNESSETH:

THAT WHEREAS, each of the parties to this agreement is the owner of forty (40) shares of the capital stock of Cumberland Public Service Company, a Kentucky corporation of Burkesville, Kentucky, and all of the parties desire that said corporation be dissolved and its assets distributed to stockholders after the payment of the debts of the corporation, and in order to facilitate such action first parties have transferred their shares of stock on the books of the company to second party pursuant to this agreement, and first parties desire that second party shall act for them and as their agent to assist in the liquidation of the corporation and obtain and distribute to first parties

their respective shares of the assets of said corporation or the value thereof,

Now Therefore, in consideration of the premises and for the sum of One Dollar ($1.00) cash in hand paid by each of the first parties to second party, receipt of which is hereby acknowledged, the undersigned party of the second part hereby agrees that he will act as agent for each of the first parties and will receive from time to time for and on behalf of each of first parties as trustee and agent for first parties all assets of Cumberland Public Service Company properly distributable to first parties, whether in money or in kind, and upon the completion of the liquidation of the assets of said corporation, party of the second part will make a true accounting to each of first parties with respect to the money and or assets so received.

37 Witness the signatures of the parties this——day of August, 1940.

(Signed) D. Keith McComas
(Signed) W. Leslie McComas, Jr.
(Signed) Jack D. McComas
(Signed) Elizabeth O. McComas
Parties of the First Part

(Signed) W. L. McComas
Party of the Second Part

Witnesses:

38 *Exhibit "G" to Petition*

Special Meeting of Stockholders

At a special meeting of the stockholders of Cumberland Public Service Company held on the 13th day of August, 1940 at the Kentucky Home Life Building in Louisville, Kentucky pursuant to a written waiver of notice signed by all of the stockholders of Cumberland Public Service Company, and all of said stockholders being present, to-wit: W. L. McComas, E. S. Mayes, and Finley Mayes, the following resolution was offered:

"Whereas, it is considered that the best interests of the stockholders of this corporation will be served by an immediate dissolution of said corporation and a liquidation of its properties,

"Be It Resolved that this corporation be dissolved in accordance with the laws of the State of Kentucky

and the Board of Directors and the persons selected by them be and they are empowered, authorized, and directed to take all steps which shall be necessary or desirable to effect the dissolution of this corporation, the liquidation of its assets and liabilities, and the distribution to its stockholders in cash or in kind of all its assets which shall not be required to pay all of its outstanding indebtedness."

Upon a motion duly made and seconded the above resolution was adopted by the unanimous vote of all of the stockholders of the corporation.

(Signed) F. M. MAYES
Secretary

39 *Exhibit "H" to Petition*

SPECIAL MEETING OF BOARD OF DIRECTORS OF CUMBERLAND PUBLIC SERVICE COMPANY

At a meeting of the Board of Directors of Cumberland Public Service Company, held at the office of Grafton & Grafton, Kentucky Home Life Building, Louisville, Kentucky, on the 13th day of August, 1940 at two-thirty p. m., all of the directors of this corporation being present, there was produced before and examined by said meeting a resolution of the stockholders of this corporation authorizing a dissolution of said corporation and authorizing and directing the Board of Directors to take such action as might be necessary or desirable to effect the dissolution of the corporation, the payment of its debts, and the distribution of its remaining assets to the stockholders, and said resolution having been discussed at this meeting, the following resolution was offered:

"RESOLVED FIRST, that W. L. McComas and E. S. Mayes be and they are hereby constituted a committee for liquidation and said committee be and is hereby authorized and directed to take such action as shall be necessary or desirable for the purpose of realizing upon the assets of the corporation the payment of its debts and the distribution to the stockholders of the assets of the corporation which shall remain after provision for the payment of said debts shall have been made.

"RESOLVED FURTHER, that said liquidation committee be and they are hereby authorized and directed to set aside from the assets of the corporation a fund sufficient to pay all of the debts of said corporation.

"Resolved Further that W. L. McComas as President, and F. M. Mayes, as Secretary, be and they are hereby authorized and directed to forthwith convey to the stockholders of this corporation of record at the date of such conveyance all of the electric transmission and distribution facilities of this corporation located in the counties of Cumberland, Metcalfe, and Monroe in the Commonwealth of Kentucky, together with all services and connecting lines, fixtures and equipment used in connection therewith, and together with all easements, rights of way, or other interests in lands used in connection with such transmission and distribution lines, and all other rights, licenses, franchises, privileges, or permits used in connection with said lines, and that said officers be and they are hereby authorized and directed to execute, acknowledge, and deliver for and on behalf of this corporation such instruments or documents as may be necessary or desirable to effect such conveyance and to affix the seal of this corporation to any or all of such instruments or documents."

Upon motion duly made and seconded the foregoing resolution was unanimously adopted.

(Signed) F. M. Mayes
Secretary

Exhibit "I" to Petition

Before the Public Service Commission of Kentucky

In the Matter of the Joint Application of Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation for the Sale and Purchase of Utility Properties.	No. 848

Comes Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation and respectfully show as follows:

(1) Cumberland Public Service Company is engaged in the business at the present time of owning and operating various electric light and power properties in the State of Kentucky and more particularly in the Counties of Cumberland, Monroe, and Metcalfe, and in the sale of electric light and power to the inhabitants of such counties and the towns therein. The nature of such business and the ter-

ritorial extent thereof are more particularly shown in the annual reports of such Company heretofore filed with the Commission. The post office address of Cumberland Public Service Company is Burkesville, Kentucky.

(2) W. L. McComas and E. S. Mayes are the principal stockholders of Cumberland Public Service Company. The post office address of W. L. McComas is 405 Belgravia Court, Louisville, Kentucky, and of E. S. Mayes is Springfield, Kentucky.

(3) Tri-County Electric Membership Corporation is a cooperative corporation owning and operating electric light and power properties in Tennessee and Kentucky, with its principal office in LaFayette, Tennessee.

(4) Certified copies of the Articles of Incorporation of Cumberland Public Service Company have been heretofore filed with this Commission and a certified copy of
42 the Articles of Association of Tri-County Electric Membership Corporation has either been heretofore so filed or is filed simultaneously herewith.

(5) Cumberland Public Service Company has been and is now taking the steps required under Kentucky law to dissolve and to terminate its corporate existence, such dissolution to be accomplished within two years from the date hereof. As a part of its dissolution and its plan of liquidation, its electric transmission and distribution system in Cumberland, Monroe, and Metcalfe Counties, Kentucky, will be conveyed to W. L. McComas and E. S. Mayes as a liquidating dividend. Such properties are more particularly described in the form of deed and bill of sale attached hereto.

(6) W. L. McComas and E. S. Mayes desire to sell to Tri-County Electric Membership Corporation and Tri-County Electric Membership Corporation desires to purchase from W. L. McComas and E. S. Mayes properties described in the form of deed and bill of sale heretofore mentioned for the consideration therein set out.

(7) Cumberland Public Service Company desires to cease operation of such properties upon the conveyance thereof to W. L. McComas and E. S. Mayes. W. L. McComas and E. S. Mayes desire to continue the operation of such properties until the delivery of the deed and bill of sale to Tri-County Electric Membership Corporation and to then cease such operations. Tri-County Electric Membership Corporation desires to begin the operation of the properties immediately upon the delivery to it of the deed from W. L. McComas and E. S. Mayes.

(8) It is contemplated that not over thirty (30) days will elapse from the delivery of the deed and bill of sale from Cumberland Public Service Company to W. L. McComas and E. S. Mayes until the delivery by W. L. McComas and E. S. Mayes of the deed to Tri-County Electric Membership Corporation, and that during such interim it is desired that W. L. McComas and E. S. Mayes be permitted to continue such operation under the trade
43 name of Cumberland Public Service Company in order to avoid confusion and unnecessary expense.

WHEREFORE, Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation pray that the Public Service Commission of the Commonwealth of Kentucky make its order authorizing the applicants to consummate and carry into effect the proposed dissolution, operation, sale and purchase of the utility properties as herein described.

Dated at Louisville, Kentucky, this —— day of August, 1940.

CUMBERLAND PUBLIC SERVICE COMPANY
By W. L. McCOMAS
President.

Arthur W. Grafton,
Counsel for Cumberland Public
Service Company.

W. L. McCOMAS,
E. S. MAYES.

Arthur W. Grafton,
Counsel for W. L. McComas and
E. S. Mayes.

TRI-COUNTY ELECTRIC MEMBERSHIP
CORPORATION,
By WILLIAM PARKER
President.
(Seal)

Harold Howser
Counsel for Tri-County Electric
Membership Corporation, Gallatin, Tennessee.

W. L. McComas, being first duly sworn states that he is President of Cumberland Public Service Company and one of the applicants in the proceeding above, that he has read the foregoing application, and that the facts therein stated are true to his own knowledge.

W. L. McCOMAS.

Subscribed and sworn to before me by W. L. McComas this 30th day of August, 1940. My commission expires the 19th day of December, 1943.

LILLIAN FLEISCHER
Notary Public, Jefferson County, Kentucky.

(Seal)

W. L. McComas and E. S. Mayes, being duly sworn, state that they are two of the applicants in this proceeding, that they have read the foregoing application, and that the facts therein stated are true to their own knowledge.

W. L. McCOMAS,
E. S. MAYES.

Subscribed and sworn to before me by W. L. McComas and E. S. Mayes, this 3d day of September, 1940. My Commission expires the 19th day of December, 1943.

LILLIAN FLEISCHER
Notary Public, Jefferson County, Kentucky.

(Seal)

William Packer, being first duly sworn states that he is President of Tri-County Electric Membership Corporation, one of the applicants in this proceeding, that he has read the foregoing application, and that the facts stated therein are true to his knowledge.

WILLIAM PACKER.

Subscribed and sworn to before me by William Packer this 31st day of Aug., 1940. My commission expires the 5th day of Jan., 1940.

L. C. PARKER,
Notary Public, Macon County, Tenn.

(Seal)

45 *Exhibit "J" to Petition*

BEFORE THE PUBLIC SERVICE COMMISSION OF KENTUCKY

A meeting of the Public Service Commission was held on this date; present: Commissioners Greenleaf, Kirtley, and McGregor.

In the Matter of the Joint Application of Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation for the Sale and Purchase of Utility Properties.	Case No. 848

ORDER

On September 5, 1940, the Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation filed with the Public Service Commission of Kentucky their properly verified application and petition by which the Cumberland Public Service Company seeks permission to dissolve, and in dissolution and liquidation, to transfer to W. L. McComas and E. S. Mayes certain properties described in said application and exhibit attached thereto; and W. L. McComas and E. S. Mayes seek authority to sell and Tri-County Electric Membership Corporation seeks authority to purchase such utility properties.

Notice of a hearing thereon having been given for this day at 11:00 a. m., there appeared for Cumberland Public Service Company, W. L. McComas, President, and Arthur W. Grafton, Attorney; W. L. McComas and E. S. Mayes in person and by Arthur W. Grafton, their Counsel; Tri-County Electric Membership Corporation by W. H. Sullivan, Manager, and Harold Howser, its Counsel. There also appeared Phillip H. Wilson, Counsel for Farm-
46 ers Rural Electric Cooperative Corporation, and E. V. Withers, Vice President of said Corporation, and H. E. Gardner, Superintendent.

Thereupon Farmers Rural Electric Cooperative Corporation by counsel made a formal protest to the transactions set forth in the application and petition but offered no proof or argument in connection therewith; and said protest having been duly considered, it is ordered and the same be and it is hereby overruled.

Thereupon the Commission having heard the statements of counsel and the testimony of witnesses as set forth in the record and being otherwise fully advised,

IT IS ORDERED, That the application of the Cumberland Public Service Company to dissolve and of W. L. McComas and E. S. Mayes to sell and Tri-County Electric Membership Corporation to purchase and acquire the utility properties set forth and described in said application and the exhibit annexed thereto be and it is hereby approved.

PROVIDED, HOWEVER, that the authority granted herein is granted on the following conditions:

(1) That the Tri-County Electric Membership Corporation by and through its Board of Directors shall specifically consent to the jurisdiction of this Commission, or its successor regulatory agency, over said Corporation to the same extent and in all respects as the Commission now has jurisdiction over public utilities generally in this State and that a certified copy of the resolution of the Board of Directors of said Corporation shall be filed with this Commission.

(2) That the transactions provided for herein shall be consummated without any interruption of, or impairment to, the service now being rendered to the customers of the Cumberland Public Service Company.

Done at Frankfort, Kentucky, this 27th of September, 1940.

PUBLIC SERVICE COMMISSION OF KENTUCKY
(Signed) CHAS. J. WHITE
(Seal) *Secretary.*

47 *Exhibit "K" to Petition*

Copy of Newspaper Notice Must Be Attached to This Statement

STATEMENT OF DISSOLUTION

To whom it may concern:

As provided by amendment to Section 561, Kentucky Statutes, as per H. B. No. 40, Acts 1932, the stockholders representing more than a majority of the stock of Cumberland Public Service Company, having consented, in writing,
(Name of Corporation and Address)
to close its business and wind up its affairs, be it now

RESOLVED, By the board of directors of said corporation that it shall now close its business as provided by said law and same is hereby declared to have been done.

THEREFORE, The Secretary of State of Kentucky is hereby authorized to cancel the charter and name of this corporation.

Done at Louisville, Ky., this 13th day of August, 1940, by vote of the directors of

CUMBERLAND PUBLIC SERVICE COMPANY
(Name of Corporation)
By W. L. McCOMAS
(President)

A Copy attest:
(Signed) S. A. SMITH
County Court Clerk, Cumberland County
By Edna Collins, D. C. C.

Form-Sec.-O-S Stodis—4

(The following is a copy of notice published in Burkesville, Kentucky, on August 15, 22 and 29 and September 5, 1940.)

NOTICE

Notice is hereby given that Cumberland Public Service Company, a Kentucky corporation, with its principal office in Burkesville, Cumberland County, Kentucky, is closing up its business and dissolving.

CUMBERLAND PUBLIC SERVICE COMPANY
W. L. McCOMAS, *President.*

48 *Exhibit "L" to Petition*

DEED AND BILL OF SALE

THIS DEED AND BILL OF SALE made this 22 day of October, 1940, by and between Cumberland Public Service Company, a corporation organized and existing under and by virtue of the laws of the State of Kentucky, with its principal office in Burkesville, Kentucky (hereinafter called "Grantor"), and W. L. McComas and E. S. Mayes (hereinafter called "Grantees");

WITNESSETH:

THAT WHEREAS, by a resolution duly adopted at a meeting of the stockholders of the Grantor called for that purpose, held on August 13, 1940, said stockholders authorized the dissolution of the Grantor and the distribution of its assets to its stockholders, and

WHEREAS, by a resolution duly adopted at a meeting of the Board of Directors of the Grantor called for that purpose,

held on August 13, 1940, said Board of Directors acting under the authority of the aforesaid resolution of the stockholders authorized the execution of this instrument by the Grantor for the purpose of conveying the hereinafter described property to the stockholders of record at the date of the making of this conveyance, and

WHEREAS, the Grantees are as of this date all of the stockholders of the Grantor, and

WHEREAS, all of the debts of the Grantor, except the unpaid balance of the indebtedness secured by the mortgage deed of trust to which this conveyance is subject, have been paid;

NOW, THEREFORE, in consideration of the premises and in part satisfaction of the obligation of the Grantor to distribute its assets to the Grantees, the Grantor has granted,
bargained, sold, aliened, enfeoffed, remised, released,
49 transferred, confirmed, conveyed and delivered and
do by these presents grant, bargain, sell, alien, enfeoff, remise, release, transfer, confirm, convey and deliver unto Grantees, their successors and assigns, all of the electric transmission and distribution lines and facilities of Grantor which as of June 10, 1940 were operated by Grantor, together with all improvements, betterments and extensions to such properties made between said date and the date hereof, including, though not by way of limitation, the following described property situated in the Counties of Cumberland, Metcalfe, and Monroe, in the Commonwealth of Kentucky, together with all the rights, privileges, appurtenances and facilities to said property in anywise appertaining or belonging, to-wit:

I.

The electric transmission and distribution lines and facilities of Grantor located in the Counties of Cumberland, Metcalfe, and Monroe, in the Commonwealth of Kentucky, and more particularly described as follows:

The electric distribution systems serving the following communities in Cumberland County, Kentucky:

Burkesville; Waterview; Dubree; Grider; Marrowbone.

The electric distribution systems serving the following communities in Metcalfe County, Kentucky;

Willow Shade; Summer Shade; Beaumont.

The electric distribution systems serving the community of Tompkinsville in Monroe County, Kentucky;

A certain electric line beginning at the city limits of Burkesville, Cumberland County, Kentucky, and extending

to Summer Shade, Metcalfe County, Kentucky, parallel with the Burkesville-Glasgow Highway (Kentucky Highway No. 90) and passing through the villages of Grider, Waterview and Marrowbone, all in Cumberland County, and Willow Shade and Beaumont, in Metcalfe County, a distance of approximately twenty-four (2) miles of which approximately thirteen and one-half (13½) miles are in Cumberland County and ten and one half (10½) miles in Metcalfe County;

Certain other transmission lines branching from the electric line mentioned above at the intersection of the Burkesville-Glasgow Highway and Kentucky Highway No. 163 paralleling said Highway No. 163 a distance of approximately eight (8) miles in Metcalfe County to Edmonton in Metcalfe County; and

Another certain electric line extending from Dubree, Cumberland County, Kentucky, and extending to Tompkinsville, Monroe County, Kentucky, via Leatherwood Creek for a distance of approximately three and one-half (3½) miles, then through the village of Persimmon in Monroe County, Kentucky, and then via Mount Hermon school and thence to a point on Kentucky Highway No. 100 approximately three (3) miles east of Tompkinsville and thence paralleling said Kentucky Highway No. 100 to the city limits of Tompkinsville, a total distance of approximately twelve and one-half (12½) miles of which approximately two and one-half (2½) miles are in Cumberland County and ten (10) miles are in Monroe County; and

II.

All service and connecting lines, poles, posts, cross-arms, wires, cables, conduits, transformers, insulators, meters, electrical connections, lamps, fuses, junction boxes, hardware, fixtures and other equipment, which at the date hereof are incorporated in or attached or connected to the lines mentioned, described or referred to in the preceding paragraph I as being included in this sale and conveyance, all of which shall be deemed to be a part thereof; and

III.

All easements, rights of way, or other interests in land or other contracts or privileges granted to or held or owned by Grantor giving to or vesting in Grantor the right, license, or privilege to construct, operate, or maintain upon lands owned or held by others, any part of the electric transmission or distribution lines herein described as being included in this sale and conveyance; and

51 IV.

All agreements and contracts granting privileges for railroad or power line or telephone or telegraph line crossings or joint use of poles or rights of way granted to or owned or held by Grantor with respect to the electric transmission and distribution lines herein described as being included in this sale and conveyance; and

V.

All licenses, franchises, ordinances, privileges or permits heretofore granted, issued or executed to, or owned or held by, Grantor by United States of America or by the Commonwealth of Kentucky, or by any county, municipality or political subdivision thereof, or by any agency, board, commission or department of any of the foregoing, authorizing the construction, operation or maintenance of the electric transmission and distribution lines herein described as being included in this conveyance, or any part thereof, but only to the extent that such licenses, franchises, ordinances, privileges or permits relate to said lines, and from the nature thereof, permit of such conveyance or assignment or partial conveyance or assignment; and

VI.

All customer records, customer contracts and agreements, customer books and records, customer accounting records, abstracts, deeds, maps, drawings, charts, tracings, blue prints, diagrams, engineering and accounting data pertaining to the relations between the Grantor and its customers or potential customers, together with all other records of every kind and character whatever pertaining to the properties herein conveyed.

Being in part the same property conveyed to the Grantor by L. R. Bardin, J. O. Alexander and Jesse Crowe, by deeds dated May 15, 1931, May 14, 1929, and Aug. 9, 1935, respectively, and recorded in the office of the Clerk of the
52 County Court of Metcalfe County, Kentucky, in Deed Book 37, page 259; Cumberland County, Kentucky, in Deed Book 52, page 284; and Monroe County, Kentucky, in Deed Book 16, page 157, respectively.

To Have And To Hold all of such properties whether real, personal or mixed and whether tangible or intangible, together with all and singular the equipment, hereditaments and appurtenances of and to the same belonging or in anywise appertaining to Grantees, their successors and assigns forever.

Grantor, for itself and its successors and assigns, covenants with Grantees and Grantees' successors and assigns in respect of all properties included within the sale and conveyance:

(a) That Grantor is lawfully seized in fee and possessed of all of said properties;

(b) That said properties and rights included within this grant, sale and conveyance are free from and clear of all liens and encumbrances of each and every nature whatsoever, except the lien of that certain mortgage deed of trust dated March 31, 1931, and recorded in Mortgage Book L, page 538 in the office of the Clerk of the County Court of Cumberland County, Kentucky and in Mortgage Book 1, page 97 in the office of the Clerk of the County Court of Monroe County, Kentucky, to the lien of which mortgage deed of trust this conveyance is subject, and except for the liens of ad valorem taxes not delinquent.

(c) That Grantor has good and lawful right to grant, bargain, sell, alien, enfeoff, remise, release, confirm, transfer and convey the same;

(d) That, except in respect of easements and rights of way along and over private property, Grantor and its successors and assigns will forever warrant and defend said properties and the title thereto against the lawful claims and demands of all persons whomsoever; and

53 (e) That in respect of said easements and rights of way along and over private property Grantor and its successors and assigns will forever warrant and defend said easements and rights of way and the title thereto against the lawful claims and demands of all persons claiming by, through, or under Grantor.

IN WITNESS WHEREOF, CUMBERLAND PUBLIC SERVICE COMPANY has caused this instrument to be made in its name and on its behalf by W. L. McComas, as its President, and has caused its seal to be hereunto affixed and attested by F. M. Mayes, as its Secretary, all as authorized by a resolution duly adopted by its Board of Directors, on this year and day first above written.

CUMBERLAND PUBLIC SERVICE COMPANY

(Seal) By W. L. McCOMAS

President

Attest:

F. M. MAYES,

Secretary.

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } ss.:

The undersigned, a Notary Public in and for the State and County aforesaid, does hereby certify that on this day the foregoing instrument of writing was produced to the undersigned in his said office by W. L. McComas, as President, and F. M. Mayes, as Secretary, respectively of Cumberland Public Service Company, a corporation, who thereupon executed, acknowledged, and delivered the same to be their voluntary act and deed as such officers of said corporation, and to be the official act and deed of said corporation by and through them as such officers.

WITNESS my hand and official seal this 22 day of October, 1940. My commission expires 12/19/43.

LILLIAN FLEISCHER,
Notary Public, Jefferson County, Kentucky.

54 *Exhibit "M" to Petition*

KNOW ALL MEN BY THESE PRESENTS: That W. L. McComas and Agnes O. McComas, his wife of Louisville, Kentucky and E. S. Mayes and Zana McElroy Mayes, his wife, of Springfield, Kentucky (said McComas and his wife and said Mayes and his wife being hereinafter collectively referred to as "Vendors"), for and in consideration of the sum of one dollar ($1.00) and other good and valuable considerations in hand paid by Tri-County Electric Membership Corporation (hereinafter called "Tri-County"), an electric cooperative corporation organized and existing under and by virtue of the laws of the State of Tennessee, at or before the sealing and delivering of these presents, receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, remised, released, transferred, confirmed, conveyed and delivered and do by these presents grant, bargain, sell, alien, enfeoff, remise, release, transfer, confirm, convey and deliver unto Tri-County, its successors and assigns, all of the electric transmission and distribution lines and facilities of Vendors which as of June 10, 1940, were operated by Cumberland Public Service Company, together with all improvements,

betterments and extensions to such properties made between said date and the date hereof, including, though not by way of limitation, the following described property situated in the Counties of Cumberland, Metcalfe and Monroe, in the Commonwealth of Kentucky, together with all the rights, privileges, appurtenances and facilities to said property in anywise appertaining or belonging, to wit:

I

The electric transmission and distribution lines and facilities of Vendors located in the Counties of Cumberland, Metcalfe and Monroe in the Commonwealth of Kentucky and more particularly described as follows:

55 The electric distribution systems serving the following communities in Cumberland County, Kentucky:

Burkesville Waterview Dubree
Grider Marrowbone

The electric distribution systems serving the following communities in Metcalfe County, Kentucky:

Willow Shade Summer Shade
Beaumont

The electric distribution systems serving the community of Tompkinsville in Monroe County, Kentucky:

A certain electric line beginning at the city limits of Burkesville, Cumberland County, Kentucky, and extending to Summer Shade, Metcalfe County, Kentucky, parallel with the Burkesville-Glasgow highway (Kentucky Highway No. 90) and passing through the villages of Grider, Waterview and Marrowbone, all in Cumberland County, and Willow Shade and Beaumont, in Metcalfe County, a distance of approximately twenty-four (24) miles of which approximately thirteen and one-half (13½) miles are in Cumberland County and ten and one-half (10½) miles in Metcalfe County;

Certain other transmission lines branching from the electric line mentioned above at the intersection of the Burkesville-Glasgow Highway and Kentucky Highway No. 163 paralleling said highway No. 163 a distance of approximately eight (8) miles in Metcalfe County to Edmonton in Metcalfe County; and

Another certain electric line extending from Dubree, Cumberland County, Kentucky, and extending to Tompkinsville, Monroe County, Kentucky, via Leatherwood Creek for a distance of approximately three and one-half (3½) miles, then through the village of Persimmon in Monroe

County, Kentucky. l then via Mount Hermon school and thence to a po[illegible] Kentucky Highway No. 100 approximately t[illegible]e (3) miles east of Tompkinsville and
56 thence paralleling said Kentucky Highway No. 100 to the city limits of Tompkinsville, a total distance of approximately twelve and one-half (12½) miles of which approximately two and one-half (2½) miles are in Cumberland County and ten (10) miles are in Monroe County; and

II

All service and connecting lines, poles, posts, cross-arms, wires, cables, conduits, transformers, insulators, meters, electrical connections, lamps, fuses, junction boxes, hardware, fixtures and other equipment, which at the date hereof are incorporated in or attached or connected to the lines mentioned, described or referred to in the preceding paragraph I as being included in this sale and conveyance, all of which shall be deemed to be a part thereof; and

III

All easements, rights of way or other interests in land or other contracts or privileges granted to or held or owned by Vendors giving to or vesting in Vendors the right, license or privilege to construct, operate or maintain upon lands owned or held by others, any part of the electric transmission or distribution lines herein described as being included in this sale and conveyance; and

IV

All agreements and contracts granting privileges for railroad or power line or telephone or telegraph line crossings or joint use of poles or rights of way granted to or owned or held by Vendors with respect to the electric transmission and distribution lines herein described as being included in this sale and conveyance; and

V

All licenses, franchises, ordinances, privileges, or permits heretofore granted, issued or executed to, or owned or held by, Vendors by United States of America or by the Commonwealth of Kentucky, or by any county,
57 municipality or political subdivision thereof, or by any agency, board, commission or department of any of the foregoing, authorizing the construction, operation or maintenance of the electric transmission and distribution lines herein described as being included in this convey-

ance, or any part thereof, but only to the extent that such licenses, franchises, ordinances, privileges or permits relate to said lines, and from the nature thereof, permit of such conveyance or asignment or partial conveyance or assignment; and

VI

All such: (a) customer records, customer contracts and agreements, customer books and records, customer accounting records; and (b) abstracts, deeds, maps, drawings, charts, tracings, blue prints, diagrams, engineering and accounting data, as pertain or refer to the relations between the Vendors and customers or potential customers of the Vendors or any of the grantors or assignors of the Vendors. Tri-County agrees to make available to the Vendors or any party in privity with them for examination and reproduction such documents and records delivered hereunder as may be requested by them and to preserve such documents and records for a period of not less than seven (7) years. All remaining records of every kind and character of the Vendors pertaining to the properties conveyed hereunder shall be retained and carefully preserved by the Vendors at the office of Cumberland Public Utilities Company at Burkesville, Kentucky, for a period of not less than seven (7) years or at such other place as may be mutually agreed upon between Tri-County and the Vendors. The Vendors agree to make available to Tri-County or any party in privity with them for examination and reproduction such of the documents, records and papers so retained as may be requested by Tri-County.

BEING, in part, the same property conveyed by Cumberland Public Service Company to Vendors by deed dated October 22, 1940 and recorded in the office of the
58 Clerk of the County Court of Cumberland County, in Deed Book 52, page 318; in the office of the Clerk of the County Court of Monroe County, Kentucky, in Deed Book 16, page 180, and in the office of the Clerk of the County Court of Metcalfe County, Kentucky, in Deed Book 37, page 270, and in part the same property conveyed to Cumberland Public Service Company by L. R. Bardin, J. O. Alexander, and Jesse Crowe, by deeds dated May 15, 1931, May 14, 1929, and August 9, 1935 respectively, and recorded in the office of the Clerk of the County Court of Metcalfe County, Kentucky, in Deed Book 37, page 259; Cumberland County Kentucky in Deed Book 52, page 284, and Monroe

County, Kentucky in Deed Book 16, page 157, respectively.

To Have And To Hold all of such properties whether real, personal or mixed and whether tangible or intangible, together with all and singular the equipment, hereditaments and appurtenances of and to the same belonging or in anywise appertaining to Tri-County, its successors and assigns forever.

Vendors, for themselves and their successors and assigns, covenant with Tri-County and Tri-County's successors and assigns in respect of all properties included within the sale and conveyance:

(a) that Vendors are lawfully seized in fee and possessed of all of said properties;

(b) that said properties and rights included within this grant, sale and conveyance are free from and clear of all liens and encumbrances of each and every nature whatsoever;

(c) that Vendors have good and lawful right to grant, bargain, sell, alien, enfeoff, remise, release, confirm, transfer and convey the same;

(d) that, except in respect of easements and rights of way along and over private property, Vendors and their successors and assigns will forever warrant and defend said properties and the title thereto against the lawful claims and demands of all persons whomsoever; and

59 (e) that in respect of said easements and rights of way along and over private property Vendors and their successors and assigns will forever warrant and defend said easements and rights of way and the title thereto against the lawful claims and demands of all persons claiming by, through or under Vendors.

Vendors will permit Tri-County free access to the records, maps, charts and diagrams of Vendors retained by Vendors, relating to the properties, business and operations included in this sale and conveyance.

The properties described herein as being included in this sale and conveyance are sold and conveyed as a going business and shall include the exclusive right as between the parties hereto and parties in privity with them to serve customers presently being served by said properties.

Vendors agree to make, execute, acknowledge and deliver or cause to be made, executed, acknowledged and delivered all such further instruments and conveyances and to take, or cause to be taken, all such further action as may

be reasonably requested by Tri-County to effectuate the intention of these presents.

This Deed and Bill of Sale may be simultaneously executed in any number of counterparts, and all of said counterparts executed and delivered, each as an original, shall constitute but one and the same instrument.

In Witness Whereof Vendors have hereunto set their hands and seals this 24 day of October, 1940.

W. L. McComas (Seal)
Agnes O. McComas (Seal)
E. S. Mayes (Seal)
Zana McElroy Mayes (Seal)

Executed by Vendors
in the presence of
Fay Shook
Arthur W. Grafton
Witnesses

60 Commonwealth of Kentucky }
County of Jefferson } ss.:

I, Lillian Fleischer, a notary public in and for the commonwealth and county aforesaid do certify that the foregoing instrument in writing from W. L. McComas and Agnes O. McComas, his wife, and E. S. Mayes and Zana McElroy Mayes, his wife, was this day produced to me in my county by the parties and acknowledged before me by the said W. L. McComas and Agnes O. McComas, his wife, and E. S. Mayes and Zena McElroy Mayes, his wife, respectively, to be their act and deed for the uses and purposes therein set forth.

Given under my hand and seal of office this 24 day of October, 1940.

Lillian Fleischer
Notary Public

(Notarial Seal)
My commission expires 12/19/43.

61 *Exhibit "N" to Petition*

Cumberland Public Service Company
Burkesville, Kentucky

Gentlemen:

It is my understanding that you are preparing to dissolve your corporate existence and liquidate your physical

assets. I further understand that you desire to dispose of the following machinery and equipment now located in the cities of Burkesville and Tompkinsville:

1-ton 1937 Ford truck
1 60 h.p. Fairbanks-Morse Diesel engine direct connected to generator
1 120 h.p. Fairbanks-Morse Diesel engine direct connected to generator
1 200 h.p. Fairbanks-Morse Semi-Diesel engine direct connected to generator
1 5-ton York Ice Plant

together with switchboard equipment and engine auxiliaries used in connection with the above equipment

I hereby offer to pay to you the sum of $1,950.00 for the above described machinery and equipment. This offer is conditioned upon your extending to me the privilege of allowing this equipment to remain in the buildings in which it is now situated for a period of two years without charging any rent for such storage. If the machinery and equipment is not removed within such two-year period, I will discuss the question of future rentals or disposition of the machinery and equipment with the owner of the real estate.

Yours very truly,

(signed) E. S. Mayes

62 *Exhibit "O" to Petition*

WAIVER OF NOTICE

We the undersigned, being all of the members of the Liquidation Committee of Cumberland Public Service Company, do hereby waive notice of the time, place and purpose of the meeting of such Committee and fix the 16th day of November, 1940 at 10:30 o'clock a. m. as the time, and the office of Grafton & Grafton, Kentucky Home Life Building, Louisville, Kentucky, as the place of a meeting of said Committee; do hereby waive all requirements of the law of the State of Kentucky relative to the notice of such meeting, and do hereby consent to the transaction of such business as may come before such meeting, particularly the consideration of the liquidation of the remaining assets of this corporation.

W. L. McComas
E. S. Mayes

Minutes of Meeting of the Liquidation Committee of Cumberland Public Service Company

A meeting of the Liquidation Committee of Cumberland Public Service Company was held in the office of Grafton & Grafton in the Kentucky Home Life Building, Louisville, Kentucky, at 10:30 a. m. on November 16, 1940 pursuant to a waiver of notice signed by W. L. McComas and E. S. Mayes, being all of the members of such Committee. W. L. McComas and E. S. Mayes attended the meeting.

The Committee discussed means for accomplishing the liquidation of the remaining assets of the corporation, including the real estate, improvements, machinery, equipment, and accounts receivable. The Committee has attempted to secure offers for the remaining assets of the corporation and has been unsuccessful in obtaining
63 bids on the real estate other than the bid of W. L. McComas hereinafter referred to and has been able to obtain bids for the machinery and equipment only as junk values. It developed that the real estate and improvements are adapted to the specialized functions of producing electric power and ice, and that there is no market for these properties for such purposes. The machinery and equipment is obsolete and in bad condition.

After a discussion of the problems involved in attempting to carry on a continuing liquidation of the assets, it was determined that the Committee should dispose of the remaining assets either by sale or distribution immediately, so that the liquidation proceedings might be terminated. In view of the apparent difficulty of disposing of the machinery and equipment in a piecemeal fashion the Committee determined that the cost of such liquidation would exceed the possible increase in price which might be realized by proceeding in that manner.

The Committee then considered the bid of W. L. McComas for the real estate. Mr. McComas offered $1,550.00 for the lots and improvements located in Burkesville and Tompkinsville, Kentucky, exclusive of the machinery and equipment. Mr. McComas offered to permit the machinery and equipment now located in the building situated on the property to remain there for a period of not more than two years from the date of the offer. After a discussion of Mr. McComas' bid the following resolution was duly adopted by the Committee:

"RESOLVED FIRST that the bid of W. L. McComas dated November 9, 1940, offering to pay the sum of $1,550.00 for the two lots described in his bid be and the same is hereby accepted, provided that the corporation and its successors in title shall have the right to leave the machinery and equipment now located on such property at its present location until November 9, 1942 without charge for rent for such storage.

64 "RESOLVED SECOND that the Committee and the officers of the corporation be and they are hereby authorized and directed to convey said lots in the name of and on behalf of the corporation to W. L. McComas in fee simple with covenant of general warranty upon payment to the corporation of the sum of $1,550.00."

The Committee then considered the bid of E. S. Mayes for the machinery and equipment located on the property sold to Mr. McComas. Mr. Mayes offered $1,950.00 for all of the machinery and equipment so located, including the following:

1 1-ton 1937 Ford truck
1 60 h.p. Fairbanks-Morse Diesel engine, direct connected to generator
1 120 h.p. Fairbanks-Morse Diesel engine, direct connected to generator
1 200 h. p. Fairbanks-Morse Semi-Diesel, direct connected to generator
1 5-ton York ice plant
together with switchboard equipment and engine auxiliaries

subject to the condition that he be permitted to leave such machinery and equipment upon the property where it is now situated for a period of two years after the date of his bid without incurring liability for rent for such storage. After a discussion of Mr. Mayes' bid and the bids of the junk dealers for the machinery and equipment, it appearing that Mr. Mayes' was the highest and best bid, the following resolution was adopted:

"RESOLVED FIRST that the bid of E. S. Mayes dated November 12, 1940 offering to pay the sum of $1,950.00 for the machinery and equipment referred to above be and the same is hereby accepted.

"RESOLVED SECOND that the Committee and the officers of the corporation be and they are hereby auth-

65 orized and directed to convey such machinery and equipment to E. S. Mayes by an appropriate bill of

sale in the name of the corporation upon payment to the corporation of the sum of $1,950.00."

The Committee proceeded to discuss the bid of Mr. W. L. McComas and Mr. E. S. Mayes for the corporation's accounts receivable now carried on the corporation's books at $4,850.50. Mr. McComas and Mr. Mayes have offered to buy all of the accounts for $4,850.50 and to take an assignment of such accounts vesting them with authority to collect the same either in their own name or in the name of the corporation, the corporation to incur no expense in connection with such collections. After a consideration of said offer, it appearing that the price bid is the best obtainable, the following resolution was adopted:

"Resolved First that the bid of Mr. W. L. McComas and Mr. E. S. Mayes, dated November 12, 1940, offering to pay the sum of $4,850.50 for all of the corporation's accounts receivable be and the same is hereby accepted.

"Resolved Second that the Committee of the officers of the corporation be and they are hereby authorized and directed to assign said accounts to Mr. W. L. McComas and Mr. E. S. Mayes by instruments satisfactory to them, authorizing them to collect said accounts in their own name or in the name of the corporation, provided that the corporation shall incur no expense in connection with such collections. It appearing to the Committee that W. L. McComas has paid to the corporation the sum of $12,204.80 and that F. M. Mayes has paid to the corporation the sum of $8,129.70, such sums being the amounts advanced by the corporation for the payment of premium on the policies of insurance on the lives of W. L. McComas and F. M. Mayes respectively, the accounts relating to such transactions are now ordered closed."

66 It appeared to the Committee that all of the assets of the corporation have been disposed of with the exception of the $37,000.00 of first mortgage notes of Horse Cave Water Company. These securities are not of such account as to find a ready market, and it was decided that these notes be distributed in kind to the stockholders of the corporation. After a discussion of the advisability of such a distribution, the following resolution was adopted:

"Resolved that the officers of this corporation and the Committee be and they are hereby authorized and directed to endorse and deliver to W. L. McComas and

E. S. Mayes the $37,000.00 of first mortgage notes of Horse Cave Water Company pro rata in proportion to their ownership of capital stock of the corporation."

It appeared to the Committee that the sales herein authorized will produce the sum of $26,685.00 for distribution to the stockholders of the corporation, all of the debts of the corporation having been paid. It further appeared to the Committee that all of the stock of the corporation is owned as follows:

W. L. McComas	200 shares
E. S. Mayes	200 shares
Total	400 shares

The following resolution was adopted:

"RESOLVED that the officers of the corporation be and they are hereby authorized and directed to distribute the cash remaining in the hands of the corporation as of November 30, 1940 as follows:

W. L. McComas	$14,342.50
E. S. Mays	$14,342.50"

There being no further business the meeting was adjourned.

W. L. McCOMAS
E. S. MAYES

67 *Exhibit "P" to Petition*

BILL OF SALE

THIS BILL OF SALE made as of the 30th day of November, 1940 by and between Cumberland Public Service Company, a corporation, and W. L. McComas and E. S. Mayes, as members of the Liquidating Committee of Cumberland Public Service Company (hereinafter called vendors) to E. S. Mayes (hereinafter called vendee),

WITNESSETH:

That for and in consideration of the sum of Nineteen Hundred Fifty Dollars ($1,950.00) cash in hand paid by the vendee to the vendors, receipt of which is hereby acknowledged, the vendors have bargained and sold and by these presents sell, assign, convey and set over unto the vendee the following described personal property located in or upon or used in connection with the two certain parcels of real estate this day conveyed by the vendors to W. L. McComas, and being situated in Tompkinsville, Monroe

County, Kentucky and in Burkesville, Cumberland County, Kentucky:

1 1-ton 1937 Ford truck
1 60 h. p. Fairbanks-Morse Diesel engine direct connected to generator
1 120 h.p. Fairbanks-Morse Diesel engine direct connected to generator
1 200 h.p. Fairbanks-Morse Semi-Diesel direct connected to generator
1 5-ton York Ice Plant
together with switchboard equipment and engine auxiliaries

The vendors covenant that they are the true and lawful owners of the good chattels hereby conveyed, that they have full power and right to sell and convey the same,
68 that the same are free and clear of all liens and encumbrances whatsoever, and that they will warrant and defend the same against all claims and demands of all persons.

In Witness Whereof, Cumberland Public Service Company has caused this instrument to be made in its name and on its behalf by W. L. McComas, its duly authorized President and has caused its seal to be affixed and attested by F. M. Mayes, its duly authorized Secretary, and W. L. McComas and E. S. Mayes have hereunto set their hands as members of the Liquidation Committee of Cumberland Public Service Company, all as of this year and day first above written.

Cumberland Public Service Company
By W. L. McComas
President

(Seal)
Attest:
F. M. Mayes
Secretary

Liquidation Committee of Cumberland Public Service Company

By W. L. McComas
By E. S. Mayes

State of Kentucky }
County of Cumberland } ss:

I, Paul A. Davis, a Notary Public in and for the State and County aforesaid, do hereby certify that the foregoing instrument of writing was produced to me in my said office

by W. L. McComas as President of Cumberland Public Service Company, a corporation, and by W. L. McComas as a member of the Liquidating Committee of Cumberland Public Service Company, who theretofore executed, acknowledged, and delivered the same to be his voluntary act and deed as such officer of such corporation and as such member of such Liquidation Committee, and to be
69 the voluntary act and deed of said corporation and said Liquidation Committee by and through him as such officer and member. Witness my hand and seal this 31 day of Dec., 1940. My commission expires April 6th, 1942.

(Seal) PAUL A. DAVIS,
Notary Public, Cumberland County, Kentucky.

STATE OF KENTUCKY }
COUNTY OF WASHINGTON } ss:

I Julia Wharton, Notary Public in and for the State and County aforesaid do hereby certify that on this day the foregoing instrument of writing was produced to me in my said office by F. M. Mayes as Secretary of Cumberland Public Service Company, a corporation, and by E. S. Mayes as a member of the Liquidation Committee of Cumberland Public Service Company, who thereupon executed, acknowledged and delivered the same to be their voluntary act and deed as such officer and member of said corporation and said Liquidation Committee, and to be the voluntary act and deed of said corporation and said Liquidation Committee by and through them as such officer and member respectively. Witness my hand and seal this 31st day of December, 1940. My commission expires 11-17-44.

(Seal) JULIA WHARTON,
Notary Public, Washington County, Kentucky.

70 *Exhibit "Q" to Petition*

Cumberland Public Service Company
Burkesville, Kentucky

Gentlemen:

I understand that you are in the process of dissolving as a corporation and are attempting to liquidate all of the corporate assets. I further understand that among the assets which you seek to liquidate is included certain real estate and improvements located in the cities of Tompkinsville and Burkesville, Kentucky, more particularly described as follows:

In Tompkinsville, a certain tract of land on Center Point Road containing about three-eighths of an acre, together with the power station and any other improvements now situated on that lot, but not including any machinery or equipment used in connection with the property.

In Burkesville, the lot adjoining the Burkesville Garage upon which the ice plant and generating plant is now situated, together with the improvements situated on that lot, but not including any of the generating or ice plant machinery or equipment.

I hereby offer to pay to you the sum of $1,550.00 for a good and merchantable fee simple title to the property referred to above to be conveyed to me by a general warranty deed. I understand that certain machinery and equipment is located in the buildings situated on these lots. It is not my intention to make any offer on this machinery and equipment, and should this offer be accepted I agree that the machinery may remain in the buildings for a period of not more than two years from the date of this offer. During such two-year period I understand that I shall not be entitled to charge or collect any rent for the machinery and at the end of such two-year period if such machinery and equipment has not been removed, I will discuss with the owner of the machinery the question of its ultimate disposition.

Yours very truly,

(Signed) W. L. McComas.

71 *Exhibit "R" to Petition*

DEED

THIS DEED made as of the 30th day of November, 1940 by and between Cumberland Public Service Company, a corporation, and W. L. McComas and E. S. Mayes, as the Liquidation Committee of Cumberland Public Service Company (hereinafter called grantors) to W. L. McComas (hereinafter called grantee)

WITNESSETH:

That for and in consideration of the sum of Fifteen Hundred Fifty Dollars ($1,550.00) cash in hand paid by said grantee to said grantors, receipt of all of which is hereby acknowledged, the grantors have bargained and sold and do by these presents grant, convey and set over unto the grantee, his heirs and assigns, in fee simple with covenant of General Warranty, the following described real property

together with all of the appurtenances thereunto belonging:

Track No. 1. That certain parcel of land lying and being in the Town of Tompkinsville, Monroe County, Kentucky, beginning at an iron pin in the rock in the branch headwaters of Mill Creek; thence North 80 West 12 poles to a stone near the forks of the Center Point Road; thence North 10 East 1 pole 3½ links to a stone on the side of the Center Point Road; thence North 48 East 3½ poles to a stone; thence South 85 East 15 poles to a stone; thence South 3 West 5 poles to a stone in Ed Richardson's line near a large sycamore; thence with said line to the beginning, containing about three eighths of an acre, being the same property conveyed to Cumberland Public Service Company by deed dated Jan. 29, 1929 and recorded in Deed Book 10, Page 415 in the office of the Clerk of the County Court of Monroe County, Kentucky.

72 Tract No. 2. That certain plat or parcel of land situated, lying, and being in the Town of Burkesville, Cumberland County, Kentucky, bounded and described as follows, to-wit: Beginning on the East side of back street in line of lot now owned by J. W. Smith, formerly owned by S. J. Smith, at a branch; thence with the line of the Smith lot down branch in Easterly course 85 feet to a stake; thence a Southwest course 8 feet to North wall of the brick building; thence with the brick building along the outside thereof 8 feet to the West wall of the Burkesville Garage workshop, a brick building; thence with the outside of the West wall of said shop building a Southwest course along the West wall 40½ feet to the center of said shop building; thence in a Northwest course with the outside of the South wall of the brick building 8 feet; thence a Southwest course with the old line between lot conveyed by W. E. Miller and wife to Less McComas and the Burkesville Garage lot 30 feet to a wire fence; thence Northwest course with the wire fence as it now stands 86 feet to a point in the back street 81 feet from the beginning corner; thence a Northwest course with said back street 81 feet to the beginning, being the same property conveyed to Cumberland Public Service Company by deed dated Jan. 28, 1929 and recorded in Deed Book 46, Page 349 in the office of the Clerk of the County Court of Cumberland County, Kentucky.

To Have And To Hold said tracts or parcels of land unto the grantee, his heirs and assigns forever, in fee simple with covenant of General Warranty.

The grantors further covenant that they are the true and lawful owners of the property hereby conveyed, that they have full power and right to convey the same, that the same is free and clear of all liens and encumbrances whatsoever, except city and state and county taxes for the year 1940 and that they will warrant and defend the same from all claims and demands of all persons.

73 In Witness Whereof, Cumberland Public Service Company has caused this instrument to be made in its name and on its behalf by W. L. McComas, its duly authorized President and has caused its seal to be affixed and attested by F. M. Mayes, its duly authorized Secretary, and W. L. McComas and E. S. Mayes have hereunto set their hands as members of the Liquidation Committee of Cumberland Public Service Company, all as of this year and day first above written.

Cumberland Public Service Company
(Seal) By W. L. McComas,
President.

Attest:
F. M. Mayes, *Secretary.*

Liquidation Committee of Cumberland
Public Service Company
By W. L. McComas
By E. S. Mayes

State of Kentucky)
County of Cumberland) ss:

I, Paul A. Davis, a Notary Public in and for the State and County aforesaid, do hereby certify that the foregoing instrument of writing was produced to me in my said office by W. L. McComas as President of Cumberland Public Service Company, a corporation, and by W. L. McComas as a member of the Liquidation Committee of Cumberland Public Service Company, who theretofore executed, acknowledged and delivered the same to be his voluntary act and deed as such officer of such corporation and as such member of such Liquidation Committee, and to be the voluntary act and deed of said corporation and said Liquidation Committee by and through him as such officer and member. Witness

my hand and official seal this 31 day of Dec., 1940. My commission expires April 6th, 1942.

(Seal) PAUL A. DAVIS,
Notary Public, Cumberland County, Kentucky.

74 STATE OF KENTUCKY }
COUNTY OF WASHINGTON } ss:

I, Julia Wharton, a Notary Public in and for the State and County aforesaid, do hereby certify that on this day the foregoing instrument of writing was produced to me in my said office by F. M. Mayes as Secretary of Cumberland Public Service Company, a corporation, and by E. S. Mayes as a member of the Liquidation Committee of Cumberland Public Service Company, who thereupon executed, acknowledged and delivered the same to be their voluntary act and deed as such officer and member of said corporation and said Liquidation Committee, and to be the voluntary act and deed of said corporation and said Liquidation Committee by and through them as such officer and member respectively. Witness my hand and seal this 31st day of December, 1940. My commission expires 11-17-44.

(Seal) JULIA WHARTON,
Notary Public, Washington County, Kentucky.

75 *General Traverse—Filed April 16, 1946.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(s) SEWALL KEY
J.H.S. Acting Assistant Attorney General.

Argument and submission of case

On February 9, 1949, the case was argued and submitted on merits by Mr. Cornelius W. Grafton for plaintiff and by Mr. J. H. Sheppard for defendant.

77 *Special findings of fact, conclusion of law and opinion of the court by Whitaker, J. Dissenting opinion by Madden, J.—Filed May 2, 1949*

Mr. Cornelius W. Grafton for plaintiff. *Mr. Henry H. Mathis*, and *Messrs. Wyatt, Grafton & Grafton* were on the brief.

Mr. J. H. Sheppard, with whom was Mr. Assistant Attorney General Theron Lamar Caudle, for the defendant. *Messrs. Robert N. Anderson* and *Andrew D. Sharpe* were on the brief.

This case having been heard by the Court of Claims, the court, upon the evidence and the report of a commissioner, makes the following

SPECIAL FINDINGS OF FACT

1. Cumberland Public Service Company (herein sometimes called "Cumberland"), a Kentucky corporation, was organized in 1929 to engage in the business of generating electricity and distributing it at retail in an area comprising three counties in Southern Kentucky. It had an authorized capital stock of 500 shares, of which only 400 were ever issued. These were issued as follows:

	Shares
W. L. McComas	200
E. S. Mayes	197
W. F. Grigsby	3

2. In 1937, W. L. McComas transferred 40 shares to himself as trustee for his daughter, Elizabeth O. McComas, and 40 shares each to himself as trustee for his three sons, D. Keith McComas, W. Leslie McComas, Jr., and Jack D. McComas, retaining 40 shares in his own name. In 1937, Finley M. Mayes acquired the three shares theretofore standing in the name of W. F. Grigsby. At the same time E. S. Mayes transferred to Finley M. Mayes 47
78 shares, to Zana M. Mayes 50 shares, and to Katherine T. Mayes 50 shares. As a result of the above transfers, late in 1937, the stockholdings were as follows:

	Shares
E. S. Mayes	50
Zana M. Mayes (wife of E. S. Mayes)	50
Finlay M. Mayes (son of E. S. Mayes)	50
Katherine T. Mayes (wife of Finley)	50
W. L. McComas	40
W. L. McComas, Trustee for Elizabeth O. McComas, (daughter)	40
W. L. McComas, Trustee for D. Keith McComas (son)	40
W. L. McComas, Trustee for W. Leslie McComas, Jr. (son)	40
W. L. McComas, Trustee for Jack D. McComas (son)	40
Total shares outstanding	400

3. On or about March 17, 1941, the plaintiff corporation filed with the appropriate Collector of Internal Revenue its final corporation income tax, declared value, excess profits tax and defense tax return for the calendar year 1940 and reported therein a loss of $7,602.49 and no tax liability. In the computation of such loss, the plaintiff disclosed the various transactions here involved with regard to the sale of the transmission and distribution lines and equipment to Tri-County Electric Membership Corporation (herein sometimes called "Tri-County") and alleged in the return that such sale had been made by the stockholders and not by the corporation. The return further disclosed the sale to Messrs. McComas and Mayes of the real estate at Burkesville and Tomkinsville, Kentucky, and the machinery and equipment referred to hereinbefore. In the return the plaintiff claimed a deduction from gross income, as a loss, the difference between the depreciated book values of such property and the prices at which the property was sold to Messrs. McComas and Mayes. In the computation of the loss the plaintiff disclosed in the return the transactions by which the transmission and distribution lines and equipment were sold to Tri-County and claimed that the sale had been made by the stockholders after a distribution of the assets to the stockholders. The return further disclosed as contributing to the loss the sales by the corporation
79 of certain real estate and machinery and equipment to two of the stockholders at less than the book value thereof.

The Commissioner of Internal Revenue, in his audit of the return, made adjustments which resulted in a deficiency in tax. The Commissioner determined that the property had been sold by the corporation rather than by the stockholders and also disallowed the losses claimed from the sales of the other property to the stockholders. The asserted deficiency of $17,054.70 was duly assessed and, together with interest thereon, was paid by the plaintiff as follows:

Deficiency.....	$17,054.70.	Paid Oct. 15, 1943.
Interest.....	$ 2,643.48.	Paid Dec. 16, 1943.

The said sum of $19,698.18 was procured by plaintiff by pro rata assessments against its former stockholders, since all of the assets of the corporation had theretofore been distributed in liquidation.

4. On July 26, 1944, the plaintiff filed a claim for refund with the Commissioner of Internal Revenue seeking a refund of taxes for the year 1940 in the amount of $19,698.18

paid as aforesaid. In claim the plaintiff alleged that the Commissioner of Internal Revenue had erred in his determinations that the sale to Tri-County of plaintiff's transmission and distribution lines and facilities had been made by the corporation rather than its stockholders and that the plaintiff was not entitled to the losses claimed in its return of the difference between the depreciated book values of the property sold to Messrs. McComas and Mayes and the amounts for which such property was so sold.

By registered letter dated August 18, 1945, the Commissioner of Internal Revenue rejected plaintiff's claim for refund in full.

Sale of Distribution Properties

5. Tri-County Electric Membership Corporation is a cooperative corporation which was organized under the laws of Tennessee in 1936. Tri-County obtained electrical energy from Tennessee Valley Authority and distributed it in an area comprising six counties in Tennessee and six counties in Kentucky, including three Kentucky counties served also by Cumberland. From its organization, it was the plan and purpose of the manager of Tri-County to
80 acquire the transmission and distribution system owned and operated by Cumberland. Tri-County did not have any substantial funds of its own. Whenever it considered the acquisition of substantial additions to its electric distribution systems, it turned to the Rural Electrification Administration, Washington, D. C., (sometimes called "REA") for a loan sufficient to pay the purchase price. REA was accustomed to making such loans to local cooperatives if the REA engineers considered the price to be satisfactory and the investment sound. Soon after Tri-County began operating, it became evident to the officers of Cumberland that Cumberland would have either to acquire power from Tennessee Valley Authority or sell its properties to Tri-County, and negotiations to that end continued more or less regularly thereafter. In October 1939, W. L. McComas called upon J. A. Krug, Chief Power Engineer, Tennessee Valley Authority, for the purpose of ascertaining whether power could be secured from the Tennessee Vally Authority, or, if not, if a sale of plaintiff's properties could be effected. The price asked for the properties by Mr. McComas was $156,000 which was based on an appraisal made in July 1939, a copy of which had been previously furnished to Mr. Krug and which indicated the following values for the property named:

Generation:	
A. Burkesville:	
I. Land	$ 2,000.00
II. Buildings:	
a. Generating Plant	3,500.00
b. Storage	500.00
III. Equipment:	
a. Diesel Power Units Alter. Exciters, Sw. Bd. & Misc. Aux. Equipment	28,955.51
B. Tomkinsville:	
I. Land	750.00
II. Buildings	1,000.00
III. Equipment:	
a. Obsolete equipment	300.00
	37,005.51
Transmission and Distribution Lines and Equipment	80,547.92
Refrigeration Equipment	5,854.70
Trucks	900.00
Construction Expense and Going Concern Value	32,229.27

81 6. On February 16, 1940, representatives of plaintiff met with representatives of the REA at Murfreesboro, Tennessee, and for several days discussed the possibility of the acquisition by Tri-County of the transmission and distribution lines of the plaintiff. The officers of the plaintiff desired to sell the entire plant as a going concern and offered to sell all the stock of the corporation to Tri-County for the sum of $156,000, which was the value determined for its facilities in an appraisal which had previously been made. However, plaintiff's officers were advised that Tri-County was not interested in acquiring either the generating plants of plaintiff or an ice plant which it operated and that Tri-County desired to purchase only plaintiff's transmission and distribution lines. This was because Tri-County had an adequate source of energy supplied by Tennessee Valley Authority. Thereupon, plaintiff's officers offered to sell the stock of the company for the sum of $115,000 with the understanding that the generating plants and the ice plant would be disposed of prior to the sale. The difference between the original price suggested of $156,000 and the reduced figure of $115,000 represented the approximate appraised value of the generating equipment and the ice plant.

Prior to this meeting Mr. McComas and his counsel had discussed the method of making the sale and had agreed that it should be made by a sale of the stock by the stockholders, and not by a sale of the physical properties by the corporation. Representatives of the REA expressed some doubt as to whether or not that organization could finance a purchase of the stock of the company, but the determination of this question was deferred until the legal representatives of the REA in Washington could be consulted.

7. On April 2, 1940, William Parker, president of Tri-County, addressed a letter to the Deputy Administrator of the REA containing the following:

* * * * * *

> We have been negotiating with the owners of the Cumberland Public Service Company, a small independently owned utility, which can be bought, we believe, at a figure of around $100,000. The Cumberland Public Service Company last year grossed about $40,000. It incorporates in its territory one of the richest agricultural areas in either Tennessee or Kentucky; the farmers of this section have repeatedly
> 82 petitioned us to serve them. There are now between eight hundred (800) and nine hundred (900) customers served by the Cumberland Public Service Company with over two hundred (200) additional farmers living along the transmission lines now connecting their towns. The economic conditions in this area and of the customers are unusually good.
>
> We would greatly appreciate your help in our acquisition of this property as we believe that it is of greatest importance to this cooperative.

8. On April 11, 1940, Mr. W. E. Herring, consulting engineer of the REA, addressed a letter to W. L. McComas reading as follows:

> A thorough study of the Cumberland Public Service Company's lines which we discussed while I was in Murfreesboro, Tennessee, discloses that we would not be warranted in approving a purchase price in excess of $86,750 for the property. This would mean that for this price you would turn over to the Tri-County Electric Membership Corporation a deed for the Cumberland Public Service Company's property exclusive of the generating plant at Burkesville and the ice plant. We would also require that the ice plant sign a three-year contract with the cooperative for its energy re-

quirements. If this price is satisfactory to you, we can have the necessary papers prepared covering the sale of the property. In the event that the sale is consummated, we would require certain additional information, of which I am writing you in a separate letter.

You will recall that I told you that there would be no money available for this purchase until July 1, the beginning of the next fiscal year and then only, of course, if Congress made appropriations for us. You seemed to feel that there would be no difficulty in working out some kind of a plan for the purchase to go through at present and payment to be made on or after July 1, provided funds were made available to us by Congress.

9. Mr. McComas, after consultation with Mr. Mayes, declined to accept the offer set out in finding 8. On May 15, 1940, they sent Mr. Arthur Grafton to Washington to consult with the REA. At that conference the legal department of the REA definitely advised Mr. Grafton that the REA could not lawfully advance money to Tri-County for the acquisition of the stock of plaintiff, but could advance money for the purchase of the properties themselves.

83 Mr. Herring, representing the REA, then made an offer of $104,000 for the physical properties desired. This offer was communicated to McComas and Mayes by Grafton. McComas and Mayes then directed Grafton to write to Herring the following letter:

Upon my return from Washington I reported our conversation to Messrs. McComas and Mayes, who felt that prior to making a commitment they should seek to ascertain what the taxes would run. We immediately employed a certified public accountant who is at Burkesville today getting certain information from the books and we are exploring two or three methods of handling the matter with possible taxes involved in each method. It will probably be the end of the week before we are able to say with any degree of assurance what the taxes will be, and until that time I am afraid my clients will be unable to make up their minds.

* * * * *

10. Plaintiff's officers employed a firm of certified public accountants to prepare computations of the taxes which would be incurred in various ways of making the sale of the properties desired by Tri-County, that is, either by a

sale of these properties by the plaintiff corporation, or by a sale of the stock in the company by the stockholders, or by dissolution of the company and a distribution of the assets to the stockholders, and a subsequent sale of the assets by the stockholders. After receiving the computations, plaintiff's officers and counsel had a conference for the purpose of considering the tax liability resulting from various ways in which the properties could be sold to Tri-County.

11. As a result of the above conference plaintiff's counsel, on May 31, 1940, addressed the following letter to W. E. Herring:

> Since my conversation with you on May 15, 1940, I have consulted with Messrs. McComas and Mayes and have in their behalf now completed a survey of the problems which would be involved in a sale to you. After considering the net result to the corporation, the directors of Cumberland Public Service Company have determined that the corporation will not accept an offer of $104,000.00 for the transmission and distribution lines.
>
> Mr. McComas and Mr. Mayes individually, however, are willing to enter into a contract with the co-
> 84 operative in such form as will be acceptable to your administration under the following terms and conditions.
>
> (1) Messrs. McComas and Mayes as individuals will acquire the transmission and distribution lines of Cumberland Public Service Company and will agree to deed the same to the cooperative for a consideration of $104,000.00, such delivery and such payment to be made as soon as practicable after September 1, 1940, and in any event within thirty days thereafter.
>
> (2) The cooperative will immediately and in any event, on or before June 10, 1940, without expense to my clients, procure whatever permission is necessary and make whatever connections are necessary to furnish to Cumberland Public Service Company or to Messrs. McComas and Mayes, if they are then the owners of the transmission and distribution lines, such power at standard TVA rates as they may need to supply that system.
>
> (3) From and after the acceptance of this proposal, if accepted, Messrs. McComas and Mayes will cause the same service to be made available to the customers of Cumberland Public Service Company and at the same rates until the date of the delivery of the deed as set

out in paragraph (1) so that you will be assured of a going concern being conveyed to you. During this period the cooperative is to have the right to either (a) make any additions or extensions or improvements on the transmission and distribution lines at the expense of such cooperative or (b) upon the specific order and direction of the cooperative, Messrs. McComas and Mayes will cause such extensions, improvements and additions to be made and the actual cost thereof will be added to the purchase price.

(4) On or before the date of the delivery of the deed, Messrs. McComas and Mayes will pay or cause to be paid all state, county, city, school district or other ad valorem taxes on said transmission and distribution lines then payable, but subject to such ad valorem taxes as may be by law then a lien against the property but not yet due and payable.

The reason for postponing delivery of the deed to September 1st or thereafter is because that I have now ascertained that the mortgage securing the outstanding bonds of the company provides that the bonds are callable on interest payment dates only and the next interest payment date is September 1st. As I told you in Washington a substantial part of the bonds are held by friends of Messrs. McComas and Mayes but some of the bonds are otherwise held and we find that we can not count on being able to get them in and so release the mortgage prior to September 1st.

As I explained to you in Washington, the power situation is an acute problem and while it is entirely agreeable to my clients to enter into an agreement looking to a deilvery of the property in the future they can only do so in the event they are assured there will be no breakdown in the meantime. You advised me that you thought you could get from TVA permission for temporarily supplying such current where there was an actual contract under which the cooperative was to acquire the property and I assume that you have not found TVA's attitude to the contrary.

The foregoing conditions have been discussed informally by Mr. McComas with Mr. Sullivan in an attempt to find some way in which to make the deal. It will probably take not less than two or three months in any event to complete the corporate transactions necessary to the delivery of the property in such form as is desired by your legal staff, and Mr. Sullivan expressed

the view that it was to the advantage of the cooperative to have some two or three months in which to get the improvements made before actually taking over the property, as he anticipated a rush of new customers at that time.

I am sending copies of this letter to Mr. McComas who will doubtless furnish one to Mr. Sullivan or to Mr. Parker. As soon as you have consulted with these gentlemen and can advise me whether our suggestions are practical, I will be delighted to have my clients meet you at such time and place as is convenient for a more formal agreement to work it out.

12. After arrangements had been completed for the furnishing of power by Tennessee Valley Authority, the offer of May 31 was accepted by Tri-County. By an instrument dated June 10, 1940, W. L. McComas and E. S. Mayes agreed to sell, and Tri-County agreed to purchase the facilities of plaintiff desired by Tri-County. Such instrument contained the following provisions:

* * * Whereas, Vendors expect to acquire all of such electric transmission and distribution lines and facilities of Cumberland and, in the event of such acquisition, desire to sell to Tri-County the electric transmission and distribution lines and facilities so acquired immediately upon such acquisition, and Tri-County is willing to purchase such electric transmission and distribution lines and facilities upon the terms and conditions herein set forth:

86 Now, therefore, for and in consideration of the mutual agreements herein contained, the parties hereto covenant, promise and agree as follows:

SECTION 1. Vendors shall grant, bargain, sell, alien, enfeoff, remise, release, convey, confirm, transfer and deliver to Tri-County the property more particularly described in the Deed and Bill of Sale, marked "Exhibit A", attached hereto and by this reference made a part hereof, with such additions and betterments as may be made to the existing system of Cumberland between the date of this contract and the Closing Date hereinafter provided for, all with covenants of warranty as set forth in such Exhibit A, free and clear of all liens and encumbrances of every kind and nature whatsoever, except ad valorem taxes which are to be prorated and provided for as set forth in Section 5 hereof. Such properties shall be conveyed as a going electric system with the exclusive right as between the

parties hereto and parties in privity with them to serve the consumers being served through such properties at the time of such conveyance. The Deed and Bill of Sale shall be executed and delivered in a sufficient number of counterparts to permit Tri-County to record such instruments simultaneously in the three counties in which the property to be acquired is located.

SECTION 2. In consideration of such sale, conveyance and delivery, Tri-County shall pay to Vendors on the Closing Date the sum of One Hundred Four Thousand Dollars ($104,000) * * *.

The effective date of this sales agreement was June 10, 1940, but the signatures of the parties were actually affixed thereto at a later date.

13. On or about August 9, 1940, D. Keith McComas, W. Leslie McComas, Jr., Jack D. McComas, and Elizabeth O. McComas entered into a written contract with W. L. McComas by which they appointed W. L. McComas their agent to assist in the liquidation of Cumberland and to receive for them their distributable portion of the assets of the corporation. The stock theretofore standing in the name of W. L. McComas as Trustee for each of them was then transferred on the records of the corporation to W. L. McComas individually.

14. Under date of August 9, 1940, Zana M. Mayes and Katherine T. Mayes executed a similar written contract with E. S. Mayes, and they then transferred to E. S. Mayes on the records of Cumberland the 50 shares of stock theretofore standing in the name of each of them.

87 Finley M. Mayes did not transfer his 50 shares to E. S. Mayes at that time because they were advised that Kentucky law required a corporation to have three directors, and that only stockholders could serve as directors.

The stock of the corporation was transferred on the records of plaintiff, and from August 10, 1940, such records showed the ownership of the stock as follows:

	Shares
W. L. McComas	200
E. S. Mayes	150
Finley M. Mayes	50

15. At a special meeting of the plaintiff's stockholders on August 13, 1940, at 2 p. m., the following resolution was adopted:

WHEREAS, it is considered that the best interests of the stockholders of this corporation will be served by

an immediate dissolution of said corporation and a liquidation of its properties.

BE IT RESOLVED that this corporation be dissolved in accordance with the laws of the State of Kentucky and the Board of Directors and the persons selected by them be and they are empowered, authorized, and directed to take all steps which shall be necessary or desirable to effect the dissolution of this corporation, the liquidation of its assets and liabilities, and the distribution to its stockholders in cash or in kind of all of its assets which shall not be required to pay all of its outstanding indebtedness.

16. At 2:30 p. m. on August 13, 1940, the Board of Directors of the plaintiff corporation held a special meeting for the purpose of transacting the business disclosed by the following minutes of the meeting:

SPECIAL MEETING OF BOARD OF DIRECTORS OF CUMBERLAND PUBLIC SERVICE COMPANY

At a meeting of the Board of Directors of Cumberland Public Service Company, held at the office of Grafton & Grafton, Kentucky Home Life Building, Louisville, Kentucky, on the 13th day of August, 1940, at two-thirty p. m., all of the directors of this corporation being present, there was produced before and examined by said meeting a resolution of the stockholders of this corporation authorizing a dissolution of said corpo-
88 ration and authorizing and directing the Board of Directors to take such action as might be necessary or desirable to effect the dissolution of the corporation, the payment of its debts, and the distribution of its remaining assets to the stockholders, and said resolution having been discussed at this meeting, the following resolution was offered:

"RESOLVED FIRST, that W. L. McComas and E. S. Mayes be and they are hereby constituted a committee for liquidation and said committee be and is hereby authorized and directed to take such action as shall be necessary or desirable for the purpose of realizing upon the assets of the corporation the payment of its debts and the distribution to the stockholders of the assets of the corporation which shall remain after provision for the payment of said debts shall have been made.

"RESOLVED FURTHER, that said liquidation committee be and they are hereby authorized and directed to set

aside from the assets of the corporation a fund sufficient to pay all of the debts of said corporation.

"RESOLVED FURTHER, that W. L. McComas as President, and F. M. Mayes as Secretary, be and they are hereby authorized and directed to forthwith convey to the stockholders of this corporation of record at the date of such conveyance all of the electric transmission and distribution facilities of this corporation located in the counties of Cumberland, Metcalfe, and Monroe in the Commonwealth of Kentucky, together with all services and connecting lines, fixtures and equipment used in connection therewith, and together with all easements, rights of way, or other interests in lands used in connection with such transmission and distribution lines, and all other rights, licenses, franchises, privileges, or permits used in connection with said lines, and that said officers be and they are hereby authorized and directed to execute, acknowledge, and deliver for and on behalf of this corporation such instruments or documents as may be necessary or desirable to effect such conveyance and to affix the seal of this corporation to any or all of such instruments or documents."

Upon motion duly made and seconded the foregoing resolution was unanimously adopted.

17. As the plaintiff was in the utility business, it was subject to the jurisdiction of the Public Service Commission of Kentucky. Therefore, all contemplated transactions affecting its business were required to have the approval of that Commission.

89 On or about September 4, 1940, a document was filed before the above-named commission entitled:

In the Matter of the Joint Application of Cumberland Public Service Company, W. L. McComas, E. S. Mayes, and Tri-County Electric Membership Corporation for the Sale and Purchase of Utility Properties

This application represented that W. L. McComas and E. S. Mayes were the principal stockholders of the Cumberland Public Service Company; that the corporation was taking the necessary steps under Kentucky law to dissolve and terminate its corporate existence; that as a part of this plan its electric transmission and distribution system would be conveyed to W. L. McComas and E. S. Mayes as a liquidating dividend; that W. L. McComas and E. S. Mayes desired to sell such property to the Tri-County Electric Membership Corporation and that Tri-County desired to purchase such property; that upon the conveyance of the property by

the corporation to McComas and Mayes, the corporation would cease the operation thereof and such operation would be continued by McComas and Mayes until the bill of sale and transfer of title to Tri-County and that Tri-County desired to begin the operation of the properties immediately upon delivery to it of the deed from McComas and Mayes. The application concluded with a prayer for an order by the Public Service Commission authorizing the consummation of the proposed dissolution, operation, sale and purchase of the utility properties therein described. All parties interested in the consummation of the plan affixed their signatures to the application.

By order dated September 27, 1940, the Public Service Commission of Kentucky granted the aforesaid application on the condition that the transactions therein set out be consummated without any interruption of or impairment to the service being rendered to the customers of the Cumberland Public Service Company.

Notice of the dissolution of the Cumberland Public Service Company was duly published in appropriate newspapers and all other formalities required by law to complete the dissolution of the plaintiff corporation were duly complied with.

18. On October 21, 1940, Finley M. Mayes endorsed and surrendered to E. S. Mayes the certificates repre-
90 senting his stock in the plaintiff corporation in the amount of 50 shares. This was done pursuant to a previous oral agreement between the parties.

19. On or about October 31, 1940, plaintiff corporation filed with the Collector of Internal Revenue a "Return of Information under Section 148 (d) of the Internal Revenue Code to be filed by Corporations within 30 Days after Adoption of Resolution or Plan of Dissolution or Complete or Partial Liquidation" in which it set forth certain information relative to its corporate existence and that the adoption of the resolution or plan of dissolution or complete or partial liquidation had occurred on August 13, 1940.

20. On October 22, 1940, the plaintiff corporation, by its president, W. L. McComas, executed a deed and bill of sale to W. L. McComas and E. S. Mayes, under the terms of which the grantor conveyed to the grantees the transmission and distribution lines and facilities which Tri-County desired to purchase.

21. By instrument dated October 24, 1940, W. L. McComas, and Agnes O. McComas (his wife) and E. S. Mayes and Zana McElroy Mayes (his wife) as vendors conveyed

the above properties to Tri-County Electric Membership Corporation. At the time of the delivery of the aforesaid instrument, the consideration of $104,000 was paid with appropriate adjustments to the effective date of the sale.

Losses on Sale of Other Properties

22. After the transfer by plaintiff to W. L. McComas and E. S. Mayes of its transmission and distribution lines, which in turn were transferred to Tri-County as aforesaid, the plaintiff continued to own an electric light plant, an ice plant, certain property in Burkesville and Tomkinsville, Kentucky, a Ford truck, certain accounts receivable and two life insurance policies, one covering W. L. McComas and the other E. S. Mayes. The plaintiff also continued to own certain notes of the Horse Cave Water Company aggregating $37,000.

23. In the return filed by the corporation there was a claimed loss resulting from the sale of machinery and equipment. The book value of this property was $8,164.99 and the indicated sale price was $1,950, showing a loss of
91 $6,214.99. The return also disclosed a loss of $1,290.12 resulting from the sale for $1,550 of real estate of a book value of $2,840.12.

24. Between August 19, 1940, and November 16, 1940, some attempts were made by the company to dispose of the machinery and equipment constituting the generating plant and ice plant which the company had been operating but which were not acquired by Tri-County. Some possible purchasers investigated the properties but no offer was received. The generating equipment was heavy, weighing between 50,000 and 100,000 pounds, and it was installed on deep concrete foundations in buildings on the real estate owned by the company. One of the generators was 20 years old, and the others were about 30 years old. These models were no longer manufactured and it was difficult to obtain spare parts when necessary. On November 16, 1940, Mr. W. L. McComas and Mr. E. S. Mayes, acting as a liquidation committee, held a meeting, at which time Mr. E. S. Mayes offered $1,950 for all the machinery and equipment, including one 1-ton Ford truck, located on the property at Burkesville and Tomkinsville, subject to the condition that he be permitted to leave the machinery and equipment upon the property for a period of two years without charge. At the same meeting Mr. W. L. McComas offered $1,550 for the real estate at Burkesville and Tomkinsville, subject to the condition of the storage of the machinery. Mr. Mayes was

the owner of other similar plants and he expected to find some use for the machinery in connection with the other plants. Mr. McComas was interested in a garage located adjacent to the real property at Burkesville and he expected that the real estate with its improvements would be useful in the operation of the garage. Each of the two stockholders attending this meeting was at liberty to make a higher offer than that offered by the other, but at the time of the meeting it had been agreed that no further offers would be made. The liquidation committee thereupon accepted the offers and authorized the sale of the properties to these stockholders by the company.

25. Certain other remaining assets of the company were also disposed of by the liquidation committee as follows: Mr. McComas and Mr. Mayes each reimbursed the company for premium payments on life insurance policies
92 which were transferred to them. The accounts receivable in the amount of $4,850.50 were bought by Mr. McComas and Mr. Mayes for $4,850.50. $37,000 of first-mortgage notes of the Horse Cave Water Company were endorsed and delivered to W. L. McComas and E. S. Mayes *pro rata* in proportion to their ownership of the capital stock of the corporation. The sales authorized by the committee produced the sum of $28,685, and this sum was directed to be distributed in cash, one-half to W. L. McComas and one-half to E. S. Mayes.

26. The machinery and equipment sold to Mr. Mayes by direction of the liquidation committee were as follows:

1 1-ton 1937 Ford truck.

1 60 H. P.
1 120 H. P.
1 200 H. P.
} Fairbanks-Morse Diesel engine, directly connected to generator.

1 5-ton York Ice Plant, together with switchboard equipment and engine auxiliaries.

The 60- and 120-horsepower engines were comparatively new in 1929 when the plant in which they were installed was acquired by or for the plaintiff company. The 200-horsepower engine was acquired second-hand in 1934 or 1935, it having previously been installed in 1920. This equipment was in regular use by the company up to August 1940.

The appraisal made in 1937 listed this equipment, exclusive of the Ford truck, as having a value of $34,710.21 as a part of a going concern. The depreciated book value was $8,164.99.

In 1941 or 1942 Mr. Mayes sold the three engines and the York Ice Plant for $8,300. The Ford truck was also sold but the selling price is not disclosed.

27. The real property sold to Mr. McComas by order of the liquidation committee consisted of the following: in Burkesville, a lot adjoining the Burkesville Garage upon which the ice plant and generating plant were located, together with the improvements; in Tomkinsville, a tract of land containing about three-eights of an acre, together with a power plant and other improvements. About two years later he sold the real estate in Tomkinsville for $400.00. He still owns the real property in Burkesville. The real property was shown in the appraisal of 1937 as having cost $7,750 and as having a value of that
93 amount as a part of a going concern. Its depreciated book value was $2,840.12. For state tax purposes, the real property, including the generating and ice plants, were appraised at $22,500 as a part of a going concern.

The value of the real property was impaired to some extent by the right to have the machinery stored without charge for two years, and also by the fact that after removal of the machinery it would be necessary to remove the concrete engine foundation before the buildings could be fully used.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, and it is therefore adjudged and ordered that plaintiff is entitled to recover of and from the United States the sum of nineteen thousand six hundred ninety-eight dollars and eighteen cents ($19,698.18), plus interest according to law on seventeen thousand fifty-four dollars and seventy cents ($17,054.70) from October 15, 1943, and interest on two thousand six hundred forty-three dollars and forty-eight cents ($2,643.48) from December 16, 1943.

Opinion

Whitaker, *Judge*, delivered the opinion of the court:

W. L. McComas and E. S. Mayes and their families owned all of the stock of the Cumberland Public Service Company, an electric light company, located in Kentucky. On June 10, 1940, McComas and Mayes entered into an agreement with the Tri-County Electric Membership Corporation to sell to it certain of the physical properties of the plaintiff com-

pany, the Cumberland Public Service Company, as soon as this company was liquidated and the properties were received by them as a liquidating dividend. The sale was later consummated.

Subsequently the plaintiff company filed its income tax return for 1940 reporting a loss on the year's operation and no tax liability. It disclosed the sale of some of its properties to the Tri-County Electric Membership Corporation, but stated that this sale had been made by the
94 stockholders, and not by the corporation. On an audit of this return the Commissioner of Internal Revenue determined that the property had been sold by the corporation, at a profit, and a tax on this profit was assessed against the corporation.

The return of the plaintiff company also claimed a loss on the sale of certain real estate of the company to one of the stockholders and a loss on the sale of machinery and equipment to another stockholder. These claimed losses were disallowed by the Commissioner. A total deficiency in tax and interest of $19,698.18 was assessed against the company. This deficiency was paid and a claim for refund was duly filed. Upon its disallowance this suit was brought.

The first issue presented is whether or not the assets sold to Tri-County Electric Membership Corporation were sold by the corporation or whether the sale was made by the stockholders.

It is clear from the testimony that from the beginning of negotiations for the purchase of the plaintiff company's assets the stockholders of the plaintiff were desirous of selling their stock in the plaintiff company, instead of causing the plaintiff company to sell the physical properties desired by Tri-County Electric Membership Corporation (referred to hereafter as Tri-County). Tri-County, however, did not desire all of the assets of the plaintiff company, and the stockholders thereupon agreed to reduce the price asked for their stock from $156,000 to $115,000, with the understanding that plaintiff company in the meantime should dispose of the assets which Tri-County did not want.

The original conference between representatives of Tri-County and the stockholders of the plaintiff company was at Murfreesboro, Tennessee, on February 16, 1940. There was present at this meeting a representative of the Rural Electrification Administration, hereinafter referred to as REA, which Administration was considering advancing to Tri-County the money for the purchase of these properties. This representative expressed doubt as to whether or not

the REA could lawfully advance money to Tri-County for the purchase of the stock of the plaintiff corporation, but no final determination of this question was had until May 15, 1940, at a conference in Washington between the representatives of the REA and an attorney who represented both the stockholders of the plaintiff company and the plaintiff company itself. At this meeting this attorney was definitely advised that the REA could not advance money for the purchase of the stock of the plaintiff company.

The REA then advised this attorney that it was willing to advance to Tri-County the sum of $104,000 for the purchase of the physical properties desired. This attorney communicated this offer to the stockholders of the plaintiff company, who then directed the attorney to write the REA in part as follows:

> Upon my return from Washington I reported our conversation to Messrs. McComas and Mayes, who felt that prior to making a commitment they should seek to ascertain what the taxes would run. We immediately employed a certified public accountant who is at Burkesville today getting certain information from the books and we are exploring two or three methods of handling the matter with possible taxes involved in each method. It will probably be the end of the week before we are able to say with any degree of assurance what the taxes will be, and until that time I am afraid my clients will be unable to make up their minds.

This accountant made computations of what the taxes would be if the corporation should sell the physical properties to Tri-County; what they would be if the stockholders sold their stock and what they would be if the corporation dissolved and distributed its assets to the stockholders and then the stockholders made the sale of the desired properties to Tri-County. After these computations had been made it was determined that the least tax liability would be incurred by dissolving the corporation, distributing the assets to the stockholders, and letting the stockholders make the sale of the desired properties.

Thereupon, the stockholders of the plaintiff company determined to accept the offer and entered into a contract with Tri-County, agreeing to transfer to it certain properties upon receipt of them through liquidation of the plaintiff company. Later, the company was liquidated, its assets were distributed to its stockholders, and the stockholders made the sale to Tri-County of the properties desired.

It is evident that the transaction was handled in the way it was handled for the purpose of incurring the least tax liability. The purpose of the stockholders in the be-
96 ginning, in undertaking to sell their stock in the plaintiff company rather than to cause this company to sell the physical assets, was to reduce tax liability as much as possible, and this purpose continued throughout the negotiations and determined the way the transaction was finally handled. There was never at any time an intention on the part of the plaintiff company or of its stockholders to cause this company to make the sale of its physical properties, because it was thought from the beginning that this would result in the greatest tax liability. Under such facts we do not think it is tenable to say that, although the sale in form was made by the stockholders, it was in fact made by the corporation.

Although the avowed purpose of the stockholders of the plaintiff company was to reduce taxes, nevertheless, every step they took in the matter was entirely legal; there is not a suspicion of fraud or evasion involved; it was an open and above-board effort to carry out the transaction in the way that would result in the least taxes. This they had the undoubted right to do.

In *Gregory* v. *Helvering*, 293 U. S. 465, 469, the Supreme Court said:

> The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted.

The court cited as authority for this statement *United States* v. *Isham*, 17 Wall. 496, 506; *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395-396; and *Jones* v. *Helvering*, 63 App. D. C. 204; 71 F. (2d) 214, 217. In the *Isham* case the Supreme Court said:

> * * * To this objection there are two answers:
>
> 1st. That if the devise is carried out by the means of legal forms, it is subject to no legal censure. To illustrate. The Stamp Act of 1862 imposed a duty of two cents upon a bank check, when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditor two checks of ten dollars each. He thus draws checks in payment of his debt to the amount of twenty dollars, and yet pays no stamp duty. This practice and this system he pursues habitually and persistently. While his operations

97 deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. He has the legal right to split up his evidences of payment, and thus to avoid the tax. The device we are considering is of the same nature.

The Government contends that this well established and sensible doctrine has been overturned by the Supreme Court in *Commissioner* v. *Court Holding Co.*, 324 U. S. 331. We cannot impute to the Supreme Court an intention to so hold. In the *Court Holding Company* case the corporation had initiated the negotiations for the sale, but when it was realized that this would result in more taxes than from a sale by the stockholders, after a liquidating dividend, the sale by the corporation was ostensibly dropped (as found by the Tax Court) and the sale was nominally made by the stockholders. The Court held that the corporation had actually made the sale. But the Court did not hold that the stockholders could not have initiated negotiations for the sale in the first instance, and could not have carried it through themselves without resulting liability on the corporation for any profit derived from the sale. The Court was of the opinion that the corporation, having initiated the sale, in effect consummated it. Its decision was based expressly on the finding of the Tax Court that "despite the declaration of a 'liquidating dividend' followed by the transfers of legal title, *the corporation had not abandoned the sales negotiations*; that these were mere formalities *designed 'to make the transaction appear to be other than what it was'* in order to avoid tax liability." [Italics ours.] It called attention to the fact that the Circuit Court of Appeals had held, instead, that "the corporation had 'called off' the sale," but held that "there was evidence to support the findings of the Tax Court, and its findings must therefore be accepted by the courts." It said:

> On the basis of these findings, the Tax Court was justified in attributing the gain from the sale to respondent corporation.

These are not the facts here. From the very beginning it was the stockholders who were negotiating for the sale of their stock. There was never any intention that the corporation should make the sale, and even when the
98 REA determined that they could not furnish the money to Tri-County to buy the stock, the stockholders still persisted in their purpose of making the sale

themselves, and for this reason they caused a dissolution of the plaintiff company, and the stockholders then in fact made the sale of the physical properties received by them as a liquidating dividend.

We are of the opinion that the principle first laid down by the Supreme Court in the *Isham* case, 17 Wall. 496, and reiterated in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, and in *Gregory* v. *Helvering*, 293 U. S. 465, is still the law. If this principle be applied to the facts of this case, we think it is altogether untenable to say that, although the sale in this case was ostensibly made by the stockholders, it was in fact made by the corporation.

The view we have taken is the same as that taken by the 5th Circuit Court of Appeals in the case of *Howell Turpentine Co.* v. *Commissioner*, 162 F. (2d) 319, in which opinions were written by Judge Sibley, and by Judges Hutcheson and Lee, all of whom expressed the opinion that although the avowed purpose is to reduce taxation, nevertheless the stockholders of a corporation may validly contract to dissolve the corporation and to sell the physical assets themselves. See also *Commissioner* v. *Falcon Co.*, 127 F. (2d) 277; *United States* v. *Cummins Distilleries Corp.*, 166 F. (2d) 17; *Acampo Winery & Distilleries, Inc.* v. *Commissioner*, 7 T. C. 629.

It is unnecessary for us to determine whether or not the plaintiff is entitled to the loss they claim upon the sale to McComas and Mayes of its remaining machinery and its real estate, since, if the sale of its transmission lines to Tri-County was not made by the corporation, it had no taxable income. Since we are of the opinion that it was not made by the plaintiff company, but by the stockholders, we do not consider whether or not the company is entitled to the deduction claimed for these losses.

Judgment will be entered for the plaintiff in the sum of $19,698.18, plus interest, according to law, on $17,054.70 from October 15, 1943, and interest on $2,643.48 from December 16, 1943.

HOWELL, *Judge*; LITTLETON, *Judge*; and JONES, *Chief Judge*, concur.

99 *Dissenting Opinion.*

MADDEN, *Judge*, dissenting:

I am unable to agree with the court's decision. The object of the parties here, as in the case of *Commissioner* v. *Court Holding Co.*, 324 U. S. 331, was to transfer certain tangible property from the plaintiff corporation, its owner, to the

Tri-County Electric Membership Corporation. In the *Court Holding Company* case, the tax consequences of a direct sale were not at first known to the selling corporation, hence it proceeded, up to a point, with the negotiation, but, upon learning that taxes would be reduced by first dissolving the corporation and distributing the assets to the stockholders, it followed that course. The court held that the fact that the transfer was made by two steps instead of one, did not, in the circumstances, reduce the tax liability. The instant case involves the same two steps, taken for the same reason. The factual difference that here the plaintiff corporation knew from the outset what the tax consequences of a direct sale would be, instead of, as in *Court Holding*, learning them later, cannot be important. The corporation had not, in that case, proceeded to the point of making a binding agreement of sale before it discovered the tax problem and changed the form of the transaction. Hence it could be said in that case, as well as in our case, that perhaps the corporation, or the stockholders who controlled it, would not have been willing to sell at all, unless they could keep the taxes which would result from the sale down to the level at which the form of the transaction was directed.

My views as to how this and similar questions of taxation should be treated are expressed in the case of *Benjamin Guinness* v. *United States*, 109 C. Cls. 84, 106, certiorari denied, 334 U. S. 819.

I do not discuss the plaintiff's claim for losses upon the sale of its remaining machinery and real estate, in view of the court's decision that there were no profits against which these losses could be set off.

101 *Judgment of the Court—May 2, 1949*

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is entitled to recover.

It is Therefore Adjudged and Ordered that plaintiff is entitled to recover of and from the United States the sum of nineteen thousand six hundred ninety-eight dollars and eighteen cents ($19,698.18), plus interest according to law on seventeen thousand fifty-four dollars and seventy cents ($17,054.70) from October 15, 1943, and interest on two thousand six hundred forty-three dollars and forty-eight cents ($2,643.48) from December 16, 1943.

103 Clerk's Certificate to foregoing transcript omitted in printing.

U. S. GOVERNMENT PRINTING OFFICE 849027 NO. 4——1949

Supreme Court of the United States

Order allowing certiorari

Filed October 17, 1949

The petition herein for a writ of certiorari to the United States Court of Claims is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE 1949